Navigating Notice Periods

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Until very recently, it was generally accepted that among the factors considered by a court in assessing the period of reasonable notice (i.e. — age of the employee, length of service, character of employment [status, compensation package] and availability of similar employment given the employee's educational background, work experience and training) it was the nature and relative status of the employee's position at termination which was one of, if not the most significant factor. The more specialized the position or the greater its status or the degree of responsibility associated with it, the lengthier the period of notice awarded. The rationale for this principle is the presumption that executives and managers would have greater difficulty finding other employment than would lower level employees.

This "principle" or "presumption" was, however, directly challenged in 1994 in Cronk v. Canadian General Insurance Co., with unsettling results. Mrs. Cronk at age 56 was terminated as part of a corporate downsizing program after 29 years of service in various clerical positions with Canadian General. She sued her employer for wrongful dismissal when she was offered 9 months severance claiming that she should receive at least 20 months. Disregarding the weight of established case law, the trial Judge held that neither the nature or character of the employment nor the individual employee's level of education, training or specialization were of particular significance in determining the appropriate notice period. Rather, the proper approach was to consider the individual's prospects for re-employment. In the trial Judge's opinion, there was no justification for distinguishing between a clerical worker and the president of the company in setting notice periods. Where both were of comparable age with similar periods of service, it would be equally difficult for both to find re-employment and so the court reasoned, the range of notice period appropriate for each should be the same. Mrs. Cronk was awarded 20 months severance at trial on this basis. It was an award perhaps eight or nine months higher than what would have been anticipated based on the established case law.

Although the trial judgment was overturned on appeal and the award reduced to 12 months, the approach to determining appropriate notice periods and the uncertainty created by the trial level decision remains far from resolved. Indeed among the three Justices who heard the appeal, there was no consensus as to how notice periods should he assessed. One Justice emphasized that it was important that employers, employees and the legal profession he able to rely on existing case law and so he supported a return to established principles. The second Justice suggested that this was not the case in which to reconsider the degree to which responsibility in employment favors a longer notice period and in any event, even if character of employment was commensurate with prospects for re-employment, it was equally arguable that a downward adjustment of notice periods for executive level position should result rather than an upward adjustment for clerical employees. The third justice felt strongly that there was a need to re-examine the factual assumptions underlying the principle as they may no longer he supportable or true.

With these mixed signals from the Ontario Court of Appeal it remains to be seen whether this case will ultimately mark a shift in emphasis from the character of employment

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to the availability of reemployment in assessing notice periods; or whether the courts will continue, as they have done in Alberta and some other jurisdictions, to recognize the need to balance the interests of the terminated employee in receiving adequate notice against the right of the employer to reduce its workforce and at a reasonable cost. What is certain is that the only way employers and employees can have any confidence as to what the notice period will be in the event of termination is to have a written employment agreement which either sets the notice period or provides a formula for its calculation. An agreement of this sort, so long as properly drafted and entered into willingly and knowingly by both parties, will likely be upheld by the courts whether it is negotiated at the time of hiring or subsequently. In the current economic climate where downsizing, cutbacks and reorganization are commonplace, these types of agreements and the certainty they provide will become more and more important to both employers and employees. Our office can assist in drafting such agreements so as to afford both employers and employees the sort of protection they require against this current and very disturbing uncertainty in the law.

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