

COVID-19 increases length of reasonable wrongful termination notice to 24 months

COVID-19 | Employment & Labour | Employment Law | Litigation | Litigation & Dispute Resolution | Reasonable Notice | Wrongful Dismissal

1 June 2021

COVID-19 has had a devastating impact on our economy. Some businesses have gone bankrupt, while others have simply closed down forever. Many people have seen their work hours reduced, while others have lost their jobs entirely. Economic recovery post-COVID remains uncertain. Accordingly for those who have lost their jobs, it is arguable that obtaining new employment will become more difficult and that COVID-19 is a factor that needs to be taken into account when determining a reasonable length of notice period.

Justice Myers in *Skowron v. ABC Technologies Inc.*, 2021 ONSC 3734 (CanLII) agreed.

In this wrongful dismissal case, the former employee moved for summary judgment. The facts showed that the former employee was 61 years old when the employer terminated his employment, that he was a professional engineer, with a master's degree in engineering, and that he earned an annual salary of approximately \$147,000.

The former employee's length of employment was in dispute because during his service for the employer, he had resigned to become a consultant. This occurred in 2000.

From 2000 to 2003, the former employer however was hired by the employer on a couple of projects. The former employer then entered into a new employment agreement with the employer and was employed from 2003 to 2020. Overall, the former employee spent 26 years working for the employer; 24 years as an employee and two years as a consultant.

Justice Myers noted that in employment law a court has discretion to overlook a break in the period of a worker's employment for the purposes of assessing the reasonable notice period: see *Hefkey v. Blanchfield*, 2020 ONSC 2438 (CanLII) at para. 82.

Nevertheless, the court accepted that the period of the former employee's consulting had created a legal break in his employment.

Although this is noteworthy, this decision is significant for its discussion of the factors that the court took into account in determining the reasonable length of notice and the discussion on the impact of future contingencies in reducing the award.

With respect to the length of reasonable notice, the seminal case remains *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294 (ON SC) in which the court held as follows:

The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

These factors are not necessarily exhaustive.

Justice Myers found that the difficult economic times caused by COVID-19 was relevant to the reasonable length of notice calculation.

His Honour stated: "I have no indication that the job market for sixty-plus year old project engineers is particularly buoyant in Toronto during the third wave of the pandemic."

Considering all of the foregoing, plus the fact that the employer refused to provide the former employee with a reference letter and that even if asked for a reference the employer would level some serious criticisms against the former employee, the court awarded the former employee, whose consecutive years of service was 17 years, a reasonable notice period of 24 months.

With respect to future contingencies, while Justice Myers explained that he had previously found that damages are assessed on a once-and-for-all basis, future contingencies could be taken into account where uncertain events might result in over-compensation. In wrongful dismissal law, there was precedent for reducing the length of reasonable notice for future contingencies.

In *Peticca v. Oracle Canada*, 2015 ONSC 2584 (CanLII), 10% was deducted from future notice in a wrongful dismissal case.

In *Patterson v. IBM Canada Ltd.*, 2017 ONSC 3067 (CanLII), the court took into account the risk of future contingencies in setting the reasonable notice period.

Here, the former employee's mitigation efforts had produced nothing so far and the employer led no evidence of any realistic job prospects available for the former employer. Notwithstanding, the court agreed that a contingency reduction of two weeks was appropriate.

Issues involving the impact of COVID-19 continue to impact employment law. As more cases are heard and as the economy emerges from pandemic, it will be interesting to see whether the pandemic will produce greater notice period in wrongful dismissal cases. A PDF version is available to download [here](#).

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact [Stephen Thiele](#) at 416.865.6651.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Author



Stephen A. Thiele

Partner

416.865.6651

sthiele@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com