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The Imperfections of a Notice Period

By Malcolm MacKillop

The recent decision by the Ontario Court of Appeal in *Love v. Acuity* provides a good reminder for employers that caution should be exercised when setting a notice period. The simple rule to follow is this: tailor-make each notice period.

In *Love v. Acuity*, Love was a Senior Vice President, one of only a few shareholders, earned about \$650,000 per year, was 52 years old and had 2.5 years of service. The trial judge awarded Love 5 months' notice. Most lawyers looking at this case thought it was a fair result. Considering that Love had only completed 2.5 years of service he was getting more than one month per year of service, which was higher than what the "rule of thumb" provides. However the Ontario Court of Appeal overturned the decision and increased the notice period from 5 months to 9 months. How the Court of Appeal reached that decision provides an important lesson in how notice periods should be calculated.

I should start by displacing some of the myths about how a notice period is calculated.

First, there is no "rule of thumb" that the Court applies. Although it is a common practice to calculate reasonable notice by reference to the threshold of one month per year of service, this is in direct conflict with the *Bardal* test which specifically requires consideration of four factors: age, length of service, character of employment and chances of re-employment.

Second, a company policy that defines what notice an employee is entitled to is not binding on the Court. The fact is, the Court will apply the notice period that it considers to be reasonable in the circumstances.

Third, company practice – or what notice is provided to other employees in the company – is not determinative of the amount of notice that a particular employee is entitled to at common law.

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Fourth, the concept of “ballpark damages” does not apply. Using an approach that determines the range of notice and then applying the low end of the range does not prevent a Court from determining what the notice period should be in a particular case. Courts will always impose what they consider to be the appropriate reasonable notice period.

Fifth and finally, “near cause” does not apply in Canada. Entitlement to reasonable notice is an all-or-nothing proposition. If there is no just cause, the notice period cannot be reduced by poor performance or any misconduct by the dismissed employee.

In *Love*, the Court of Appeal applied the *Bardal* factors and made it clear that all four factors must be considered in setting the appropriate notice period. The Court of Appeal found that the trial judge had incorrectly placed too much weight on Love’s short length of service and too little emphasis on Love’s character of employment and chances of re-employment. Essentially, the Court of Appeal found that Love was a senior executive, not a sales person, and was a shareholder who earned a significant income, and therefore it would be more difficult for him to secure alternative employment. All of this justified a higher reasonable notice period.

This case emphasizes that all four *Bardal* factors should be considered in setting a notice period. What this means is that depending on the facts of the particular case, a short service employee may be entitled to a lengthy notice period that is greater than one month per year of service, and a long service employee may be entitled to less than one month per year of service.

The correct approach, in my view, is to start with the *Bardal* factors, consider each factor, and place the appropriate weight on each. In addition, consider company policy, practice and any other relevant factor that can assist you in getting the notice period right. Although the *Bardal* test is still commonly relied upon by judges to set the notice period, I also find that judges are willing to consider any relevant factor that may impact on an employee’s likelihood of securing alternative employment. Applying this holistic approach will save your company money in the long run and will no doubt reduce the risks of expensive litigation.

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