

Ontario Court Holds that COVID's Impact on Job Search is Not a Relevant Factor in Assessing Reasonable Notice Period

Laurie Jessome

January 18, 2022

A recent decision of the Ontario Superior Court of Justice offers some guidance to employers faced with claims from employees who were terminated prior to the onset of COVID-19 who faced increased difficulty in finding new employment due to the impact of the pandemic. In *Flack v. Whiteoak Ford Lincoln Sales Limited* (2021 ONSC 7176), Justice Dunphy was asked to assess a reasonable notice period for Mr. Flack, a 61 year old Finance Manager at a car dealership whose employment was terminated without cause after only 9 months of employment. Mr. Flack argued that he was entitled to a longer notice period because of his age, short period of service, and the difficulties he faced finding new employment once the COVID-19 pandemic began in Ontario. He asked the Court to find that he was entitled to eight months notice of termination. The defendant argued that the appropriate notice period was just over two months.

Justice Dunphy began by noting that the determination of an appropriate notice period for a particular employee must be done on a case-by-case basis, having regard to the unique circumstances of the individual. Justice Dunphy stated that case law databases showing average notice periods can be useful in identifying ranges or highlighting outliers but should not serve as a substitute for the exercise of assessing the appropriate notice period for the individual employee having regard to the factors set out in *Bardal v. Globe & Mail Ltd.* (Bardal), i.e. character of employment, length of service, age, and availability of suitable alternative employment.

1. **Character of Employment:** Justice Dunphy rejected the proposition that a review of “character of employment” should be used to support an assumption that executive-level or higher paid roles will always result in a longer notice period than so-called “low skill” positions. Instead, Justice Dunphy confirmed that this factor requires a review of the nature of the position held by the former employee and the degree to which it required a “custom fit.” The more specialized the role, the longer it would likely take to find new employment. Applying this factor to Mr. Flack, Justice Dunphy held that there was a relatively active market for individuals with Mr. Flack’s experience and training and that there was evidence of high turnover in roles like Mr. Flack’s. Accordingly, the character of Mr. Flack’s employment with the defendant did not weigh toward a longer notice period.
2. **Length of Service:** Mr. Flack took the position that his short service with the defendant entitled him to a lengthier notice period as it put him at a disadvantage in searching for new employment. Justice Dunphy did not accept this argument, noting that Mr. Flack’s employment history (which included

several short service stints with other employers) demonstrated that a short period of service did not materially impact his employment prospects.

3. **Age:** Many plaintiffs take the position that searching for new employment in one's 60s is more challenging because of assumptions potential employers may make regarding older individuals. Justice Dunphy found that it was "dangerous" to rely on the presumed existence of such assumptions when there is no evidence before the court regarding their impact on the individual's job hunt. Justice Dunphy went on to say at paragraph 20 of the decision: "It cannot be said that older employees are for that reason alone entitled to a greater notice period than younger employees. Indeed, there are very strong policy reasons that would militate against such a principle. Such a principle would quickly become a self-fulfilling prophecy. If hiring older employees brings along greater risk and greater commitment to a potential employer, the rational employer will discount applications from older employees in favour of younger ones unless other advantages outweigh that additional risk." Justice Dunphy reviewed Mr. Flack's employment history and found little evidence of difficulty in finding new employment due to his age.
4. **Availability of Similar Employment:** Mr. Flack asked the Court to provide him with a longer notice period because of COVID-19's impact on the job market. Mr. Flack gave evidence to the effect that several job opportunities that he had been actively pursuing effectively dried up once the pandemic hit. Justice Dunphy accepted that COVID-19 may have had an impact on Mr. Flack's job search but rejected the argument that this should result in an extension of the reasonable notice period. Since the obligation was on the employer to determine the appropriate period of reasonable notice at the time of termination, it followed that it must do so based on the information available to it at that time. "COVID was doubtless a hardship to Mr. Flack and the defendant both. I cannot allow sympathy for the plight of one party or another sway my impartial assessment of the facts. COVID was clearly a subsequent event in this case and ought not to impact the determination of the period of reasonable notice." (para 29)

Ultimately, the Court awarded Mr. Flack two months of reasonable notice, finding that his brief period of service tended to push the needle toward the lower end of the range of notice periods. Since the industry and market conditions in which Mr. Flack's job search commenced were reasonably robust and since Mr. Flack possessed a combination of skills and experience that would have made him attractive to new employers in that market, there was no justification for extending his reasonable notice period on the basis of his age or character of employment.

This decision provides employers in Ontario with a useful overview of the Bardal factors and how they can be used to determine the appropriate notice period for an employee who is entitled to reasonable notice of termination. It also provides clarity on whether or not events that occurred subsequent to the termination should be taken into account when calculating reasonable notice.

A link to the decision can be found [here](#).

Cassels

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.