

Ontario Superior Court of Justice Hints at Impact of COVID-19 on Reasonable Notice Periods

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Many employers have been waiting to see if COVID-19 would begin to push reasonable notice periods upward and the Ontario Superior Court of Justice recently issued a decision that suggests that this could be the case. However, we do not yet have specific guidance on how the courts will quantify this impact.

In *Yee v Hudson's Bay Company* (2021 ONSC 387), the plaintiff, Mr. Yee, sought damages arising from his alleged wrongful dismissal by Hudson's Bay Company in August of 2019. At the time his employment was terminated, Mr. Yee had just under 12 years of service and was 62 years old. He did not have a contract that limited his entitlement to notice of termination and, as such, was entitled to reasonable notice of termination.

At trial, Mr. Yee's counsel argued that Mr. Yee's reasonable notice period should be extended to reflect the impact of the pandemic on his prospects for re-employment. Mr. Yee asked the Court to apply the reasoning of Justice Perell in *Paquette v. TeraGo Networks Inc.* (2015 ONSC 4189) (*Paquette*), where he noted that, "Economic factors such as a downturn in the economy or in a particular industry or sector of the economy that indicate that an employee may have difficult finding another position may justify a longer notice period." Mr. Yee's counsel argued that the impact of the pandemic on Mr. Yee's job search effort was so profound that he should be provided with notice at the "highest possible end of the appropriate range."

Justice Dow noted this request by Mr. Yee's counsel but found that the principle cited in *Paquette* had to be considered in the context of the statement of the Ontario Court of Appeal in *Holland v. Hostopia.com Inc.* (2015 ONCA 762), where the Court of Appeal noted that reasonable notice of termination was to be determined "by the circumstances existing *at the time of termination*" (emphasis added). Justice Dow stated that, "It seems clear terminations which occurred before the COVID pandemic and its effect on employment opportunities should not attract the same consideration as termination after the beginning of the COVID pandemic and its negative effect on finding comparable employment." (para 22)

Since the pandemic was not in effect at the time of Mr. Yee's termination in August of 2019, it was not to be taken into account in calculating his entitlement to reasonable notice of termination. Instead, Justice Dow relied on the *Bardal* factors and held that Mr. Yee was entitled to a 16 month notice period.

Although Justice Dow did not specifically state how the pandemic will impact the assessment of reasonable notice periods for employees whose employment was terminated after the onset of COVID-19, he did

confirm that its "negative effect on finding comparable employment" is a factor that may be taken into account.

Employers have always had the onus of showing that a terminated employee has failed to properly mitigate their damages but the decision in *Yee v. Hudson's Bay Company* suggests that employers who wish to avoid a COVID-19 bump may need to be prepared to show not only that the plaintiff did not take appropriate steps to find new employment, but also that the sector in which the employee worked was not adversely impacted by COVID-19 such that the plaintiff would have had a harder time finding employment than if he or she had lost their jobs in a non-pandemic environment. Depending on the industry in which the employer operates, this may be a difficult hurdle to overcome.

The Cassels employment team will continue to monitor decisions regarding the impact of COVID-19 on employment matters and is available to assist employers with managing these risks.

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