



SMHI LEGAL NOTES

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BARRISTERS & SOLICITORS • TRADEMARK AGENTS

Volume 26

Summer 2011

Reasonable Notice: Back to Basics

When it comes to termination of employment, the general rule (at least in a non-union shop) is that employers have the right to determine the composition of their workforce. Therefore, employers are not required to retain employees who no longer fit in with their plans. However, before letting an employee go, without specific cause for termination, the employer is under an obligation to either provide the employee with reasonable notice of termination or payment in lieu.

Background

The 1960 decision of *Bardal v. Globe & Mail Ltd.* is the seminal court case for determining the notice that is reasonable in situations involving the termination of employment. In its famous passage, the Court stated:

There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. 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.

Despite the clear direction laid out by the Court in *Bardal*, over the years an unwritten rule has developed—one month of notice for each year of employment. While this rule of thumb turns the determination of the notice period into a simple mathematical calculation, it all but ignores the other six factors listed by the Court.

Recently, the Ontario Court of Appeal handed down a deci-

sion reminding courts and employers that all the factors outlined in *Bardal* must be given equal consideration when calculating notice.

The Facts

In 2002, Paul Love left the accounting firm in which he was a partner. He had decided that he wanted to work in the investment management field so that he could acquire an equity interest in his employer.

He eventually joined Acuity Investment Management Inc. as one of two senior vice-presidents. At the time of his dismissal, two and a half years later, he had the sole responsibility for managing Acuity's institutional investment clients. He was also a 2% owner of Acuity and one of nine shareholders. At the time of Love's dismissal without cause he was 50 years old. Acuity provided him with the equivalent of five months compensation in lieu of notice. Love was not satisfied and he sued Acuity.

The Courts

The trial judge reviewed the passage from *Bardal*, before zeroing in on the relatively short length of Love's service as being the most significant consideration. Following a cursory review of the other factors outlined in *Bardal*, the trial judge concluded that in all the circumstances the reasonable notice period in this situation was five months.

On appeal, the Ontario appellate court set aside the trial judge's decision finding that he had erred in principle in three respects.

1. The trial judge overemphasized Love's short service thus giving it a disproportionate weight.

Although the trial judge rightly considered other wrongful dismissal cases involving a short tenure by the employee, the other facts in those cases were too dissimilar to be helpful in Love's situation. For instance, neither of the employees in those cases was an owner of the business nor was their annual compensation anywhere near as great as Love's.

2. The trial judge underemphasized the character of Love's employment.

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The articles in SMHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.

Is Your Business Ready?

In 2005, the Ontario government brought into law the *Accessibility for Ontarians with Disabilities Act, 2005*. The goal of this Act is to develop, implement and enforce accessibility standards in order to achieve accessibility regarding goods, services, facilities, accommodation, employment and buildings for Ontarians with disabilities.

The *Accessibility Standards for Customer Service* is a regulation passed pursuant to the Act with the purpose of moving organizations in Ontario forward on accessibility. The Standard sets out obligations for certain persons, businesses and other organizations to provide goods or services in a way that is accessible to people with disabilities.

Definition of Disability

The definition of disability that applies to the customer service standard is as follows:

any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

- a condition of mental impairment or a developmental disability,
- a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- a mental disorder, or
- an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997.

Compliance Date

People and organizations in the private sector that provide goods or services to the public or other third parties, and who have at least one employee in Ontario, must comply with this Standard by January 1, 2012. The types of people and organizations that are affected include, but are not limited to, stores, restaurants, bars, garages, hair salons, charities, theatres, travel agencies, places of worship, dentists and accountants. Are you ready?

What Is Expected?

The following is a general overview of the things that you and/or your organization are expected to do.

1. Establish policies, practices and procedures on provid-

ing goods or services to people with disabilities.

2. Set a policy on allowing people to use their own personal assistive devices to access your goods and use your services.
3. Communicate with a person with a disability in a manner that takes into account his or her disability.
4. Allow people with disabilities to be accompanied by their guide dog or service animal.
5. Permit people with disabilities who use a support person to bring that person with them while accessing goods or services.
6. Where admission fees are charged, provide notice ahead of time on what admission, if any, would be charged for a support person.
7. Provide notice when facilities or services that people with disabilities rely on to access or use your goods or services are temporarily disrupted.
8. Train staff, volunteers and contractors on the customer service standard.
9. Train staff, volunteers and contractors who are involved in developing your policies, practices and procedures on the provision of goods or services on the customer service standard.
10. Establish a process for people to provide feedback on how you provide goods or services to people with disabilities and on how you will respond to any feedback and take action on any complaints.

In addition to the above, those with 20 or more employees have three additional requirements to meet. They are:

1. Document in writing all your policies, practices and procedures for providing accessible customer service and meet other document requirements set out in the standard.
2. Notify customers that documents required under the customer service standard are available upon request.
3. When giving documents required under the customer service standard to a person with a disability, provide the information in a format that takes into account the person's disability.

Clarification

It is important to understand that the Standard does not set accessibility requirements for the goods themselves, but rather

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the way that they are provided to customers, clients and members. For instance, a business that carries do-it-yourself contracts or leases must comply with the customer service standard in how it serves its customers and sells its product. However, the business is not required to provide accessible goods, i.e. accessible versions of the contracts or leases.

In addition, the Standard does not tell organizations how to make services accessible. Instead, each organization is free to decide how to provide its services in a way that is accessible to people with disabilities. For instance, the Standard does not require that the organization make its premises wheelchair accessible per se, only that the organization develop a policy and practice for making the premises accessible.

Enforcement

The Act allows for enforcement of the Customer Service Standard through inspections, compliance orders and administrative penalties.

Three More

On June 3rd, the provincial government announced the passage of three more accessibility standards.

The *Accessibility Standard for Information and Communications* will help people with disabilities access more sources of information, including: websites, public libraries, textbooks, and public safety information.

Organizations will need to provide public safety information in alternate formats - such as large print - starting January 1, 2012. Other requirements will be phased in over time.

The *Accessibility Standard for Employment* will make accessibility a normal part of finding, hiring and communicating with employees who have disabilities.

Starting January 1, 2012, organizations will need to provide their employees with disabilities with emergency response information that is tailored to the employee's needs, if the disability requires it.

The *Accessibility Standard for Transportation* focuses on making transportation services accessible. This includes buses, trains, subways, streetcars, taxis and ferries.

Some requirements for this standard come into effect on July 1, 2011, including equal fares for all customers, making verbal pre-boarding and on-board announcements and providing courtesy seating. Other requirements will be phased in over time.

Additional Information

If you would like further information about the Accessibility Standards for Customer Service go to www.AccessON.ca where you can download a Getting Started Guide, a template plan, training tips and checklists. ☞

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Although he did recognize that Love held a senior position with Acuity, the trial judge found the fact that Love did not supervise any of the company's 90 employees telling. The appellate court felt that the following factors, despite their significance, were wrongly ignored by the trial judge.

- Love was one of only two senior vice-presidents and he reported directly to the CEO.
- He was responsible for an important part of Acuity's operation.
- His significant annual compensation of \$630,000+.
- He was one of only nine owners of the company.

3. The trial judge's failure to give any consideration to the availability of similar employment.

The Court of Appeal stated that both Love's substantial compensation and his equity participation in his employer were relevant in assessing similar employment opportunities. Both these factors suggested that obtaining similar employment would be harder rather than easier.

Taking all of the above into consideration, Mr. Justice Goudge, on behalf of the Court of Appeal, concluded:

...the character of the appellant's employment, viewed fully, and the challenge of finding similar employment both require a significantly longer period of notice. Giving appropriate weight to these factors, and keeping in mind the appellant's age and short service I would set aside the 5 months awarded at trial and substitute a period of 9 months.

The Lesson

A notice period equivalent to one month for every year of service is a straightforward way of determining what an employer owes an employee who has been terminated without cause. However, the *Love* case makes it clear that **all** the factors outlined in the *Bardal* case must be given equal consideration, even if not equal weight, when calculating termination pay.

Epilogue

Leave to appeal this decision to the Supreme Court of Canada is being sought. Stay tuned. ☞

A Family Joint Venture

The number of couples choosing to live together outside the bonds of matrimony is steadily increasing. Many of the benefits and legal protections afforded to married couples are now being extended to couples living common law. One of the main exceptions to this rule, however, occurs when the relationship ends.

When a marriage breaks down, there are a number of laws, including the *Divorce Act* and the *Family Law Act*, that govern the dissolution. The same cannot be said for the demise of a common law relationship. This difference has been most keenly felt when it comes to dividing property accumulated during the relationship.

Following the breakdown of a marriage, spouses are entitled to a division of their property, a process known as “equalization”, which attempts to divide equally all property acquired after marriage subject to certain exceptions and rules. This does not apply to unmarried couples. Instead, the common law spouse seeking a fair share of the property has to go to court and argue that the other party has been unjustly enriched, an uphill battle to be sure.

Two recent rulings by the Supreme Court have now made it easier for common law spouses to get a more equitable division of property. A common law spouse must still base his/her argument on the legal concept of unjust enrichment however the high court has set out a number of factors that provide for a new way of looking at property division.

To successfully argue in favour of unjust enrichment generally, a person needs to show that the other party was enriched and that it was at the expense of the claimant. In the family law context, a

common law spouse previously had to show a specific link between his/her contribution, either through money or some form of services, for the asset to be shared.

As a result of the Supreme Court’s recent ruling, if a party can show that the common law couple functioned as a “family joint venture” the relationship will fall within this new way of looking at property division. The Court set out four non-exhaustive criteria for determining whether a couple functioned as a family joint venture.

- **Mutual effort:** Whether the parties worked collaboratively towards common goals.
- **Economic integration:** The degree of economic interdependence and integration that characterized the parties’ relationship.
- **Actual intent:** The actual intentions of the parties, whether expressed or inferred from their conduct, must be given considerable weight.
- **Priority of the family:** The extent to which the parties gave priority to the family in their decision-making.

While this ruling makes things easier for common law couples in the event their relationship breaks down, it is certainly not a magic formula for dividing property. Each case will still be based on its own set of circumstances.

If a couple chooses not to marry they need to consider a cohabitation agreement. Contact our experienced family law team to discuss your situation. 📁

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