Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers
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## Working notice requires caution

"Working notice is an institution almost invariably predestined to fail". Those are the words of an Ontario Superior Court judge who considered the case of an employee who, two days after having received eight weeks of working notice of dismissal, became so disruptive and uncooperative that the employer purported to terminate her immediately for cause. Significantly, the Court held that the employer could not dismiss the employee for cause when the consequences of the working notice were so readily foreseeable.

While not all courts will be so forgiving of employee misconduct that occurs during a period of working notice, employers should be cautious about electing to keep a terminated employee on during the notice period. Even though the employee is relatively cooperative and no acrimony occurs, the question arises as to the level of attendance an employer is entitled to expect from employees working out their notice period. This issue is raised by the fact that one of the main purposes of reasonable notice is to afford the employee time to secure new employment.

### *KONTOPIDIS*: FULL ATTENDANCE REQUIRED DURING WORKING NOTICE PERIOD

This was the issue in *Kontopidis v. Coventry Lane Automobiles Ltd.* (May 12, 2004), a case in which an employee dismissed for cause after having been given four months of working notice sued for wrongful dismissal. After Kontopidis was given notice of his termination, his attendance became a matter of concern for the employer. The employer directed Kontopidis to advise the secretary in writing or his manager in person before leaving the premises during working hours. A few weeks later, he was warned that failure to comply would result in his termination. One week later, he left work at 11:00 a.m., picked up a customer's car and took it home, intending to bring it in to work the next day. On his return to work, he was terminated for failing to comply with the employer's directive.

The trial judge accepted Kontopidis' evidence that he had advised another employee that he was leaving, and noted that he had probably felt that, if he were needed, he could be reached by phone. However, the judge also observed that it was clear that Kontopidis' attendance had become problematic and that he was less than motivated at work. Noting that Kontopidis probably felt affronted at having to comply with what he considered unnecessary and unreasonable conditions, the judge held that the employer had cause for dismissal. The judge expressed the following views about the extent of an employee's attendance obligations during working notice:

> "Working notice is difficult on both the employer and the employee and can lead to problems in the employment relationship. However, the employer is entitled to require full attendance and to impose reasonable conditions to ensure full attendance."

## *BRAMBLE*: "NO WEIGHT" TO WORKING NOTICE PERIOD IF FULL ATTENDANCE REQUIRED

The approach taken *Kontopidis* should be compared with that of the New Brunswick Court of Appeal in *Bramble v. Medis Health and Pharmaceutical Services Inc.* (July 2, 1999). The *Bramble* case involved a number of employees who were given 15 weeks of working notice, after which they were to receive a separation allowance as long as they attended work regularly during the notice period. The employees were dissatisfied with the allowance and brought an action alleging that the employer had failed to provide reasonable notice of termination. They succeeded at trial, and the employer appealed the notice periods awarded to the employees.

Noting that the trial judge had found as a fact that the employees had not been able to look for work during the period of working notice, the Court rejected the employer's argument that the 15-week period of working notice should be factored into the employees' entitlement. To accede to the employer's argument, the Court held, would "permit formalism to triumph over substance" and be unjust to the employees. The Court went on to state that the relevance of time spent on working the notice period depends on an employee's opportunity to seek alternate employment while on the job:

> "[T]he primary objective of notice is to provide the dismissed employee with a fair opportunity to obtain similar or comparable employment. It follows that the weight to be given to a particular working notice will vary depending on the quality of the opportunity it gives the employee to seek an alternate position. In this particular case, the trial judge's finding of fact that the [employees] could not actively seek work during the working notice period deprives the latter of any legal value. As a result, no weight can legitimately be attached to it."

## *TAYLOR*: NO DIFFERENCE BETWEEN WORKING NOTICE AND PAY IN LIEU

If, according to the New Brunswick Court of Appeal, the value of working notice depends on the employee's opportunity to seek other work, can an employer convert an offer of working notice of a certain period to a lump sum payment for a shorter period during which the employee is not required to attend work? According to *Taylor v. Brown* (November 16, 2004), a decision of the Ontario Court of Appeal, the answer is "no".

The *Taylor* case involved an employee with 21 years of service who was terminated with 18 months of working notice. The termination notice and the recent death of Taylor's immediate superior, whom she regarded as a close friend, caused her to be distraught. Taylor was advised by her physician to take stress leave. While she was on leave, the employer decided to terminate her immediately with six months of pay in lieu of notice. Taylor went to court to recover the original notice.

At trial, the judge ruled that the employer was precluded from unilaterally reducing the notice, stating that Taylor had relied to her detriment on the original offer. However, without giving reasons, he reduced the notice to 12 months of pay in lieu of notice. Taylor appealed this award.

The Court of Appeal ruled in favour of Taylor. Noting that the trial judge had found that 18 months of working notice was appropriate, the Court stated that the issue in the case was whether there was any legal difference between working notice and pay in lieu of notice that entitled the trial judge to substitute 12 months of pay for 18 months of working notice. The

Court held there was no difference, despite the fact that a working notice made it more difficult to find alternate employment:

> "While the purpose of the notice period is to provide time for employees to find alternate employment, a task made more difficult while the employee undertakes to fulfill the terms of working notice, we are of the view that there is no functional difference at law between working notice and payment in lieu of notice.
> Proper notice of termination is an implied term of the contract of employment; payment in lieu of notice is not. We agree with the opinion of [the British Columbia Court of Appeal in *Dunlop v. British Columbia Hydro and Power Authority* …] that payment in lieu of notice is seen as "an attempt to compensate for [the employer's] breach of the contract of employment, not as an attempt to comply with an implied term of the contract of employment". The quantum of a payment in lieu of notice, therefore, is not calculated in accordance with the terms of the contract, but rather is a means by which an employer may terminate an employee contrary to its common law duty to give reasonable notice of termination, without incurring any liability."

The Court then considered whether the employer had been entitled to revoke its initial offer of 18 months of working notice and substitute the offer of six months of pay in lieu. It rejected the trial judge's conclusion that, because Taylor had relied on the offer, the employer was precluded from amending it. The Court stated that there was no evidence of any detrimental reliance by Taylor on the first offer.

However, the Court noted, because the trial judge had held that the offer of 18 months was reasonable – a ruling with which the Court of Appeal concurred – the second offer of six months was not reasonable. There had been no change in any of the relevant factors for determining reasonable notice in the three-week period between the two offers. Accordingly, Taylor's appeal was allowed.

## In Our View

Some observers have pointed out that the conclusions of the Court in the *Kontopidis* case should be read with caution. If there had been any evidence that the employee had been absent from work to search for new employment, the result might have been different. As it was, there was little evidence that Kontopidis had provided any explanation for his absences. Accordingly, the lesson seems to be that, if an employer determines that working notice is feasible, it should be careful to allow the dismissed employee a reasonable opportunity to seek new employment. If not, there is a risk that the notice period granted by the employer will be deemed invalid by a court.

Moreover, despite the ruling by the Court of Appeal in the *Taylor* case that there is a one-to-one equivalence between working notice and paid notice – a ruling that ignores the fact that working notice may be less likely to offer an employee the opportunity to seek new work – employers should consider carefully whether it is worth having employees work out the notice period. The benefits derived from having a dismissed employee provide work in return for his or her pay during the notice period can be outweighed by the costs in terms of poor morale, substandard performance and disciplinary issues.

For further information, please contact Colleen Dunlop at (613) 940-2734.

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