Leading Trends in Employment Law in 1998

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Introduction

Reasonable Notice

There have been a number of trends in 1998 affecting the determination of reasonable notice periods. Most, if not all of these trends have been favourable to dismissed employees.

A) Breaking of the 24 month ceiling.

Up until Donovan v New Brunswick Publishing (184 nbr (2d) 40) in 1996 there was no case in canada which awarded more than 24 months absent a contract. Donavan involved a 57 year old Sports Editor with 36 years service. He was awarded 28 months notice.

Then in 1998 came along Kilpatrick v Peterborough Civic Hospital , a decision of Mr. Justice Wilkins of the Ontario Court General Division..(38 or (3d) 298) The plaintiff was 60 years old and was CEO of the Hospital. He had only been with the Civic for 6 years but he had been induced away from his previous employment in New Brunswick where he held a comparable position for approx 29 years. The court awarded him 30 months. There were at least 3 interesting points about this case vis a vis notice. One, the judge specially said that the fact that the inducement had taken place 6 years ago rather than the more recent past did not diminish the effect of the inducement. In prior cases an inducement of more than 2 or 3 years previous would be largely ignored. Secound the judge found that given the discussions and reasonable expectations of the parties, it was

fair to assume that the employment would be long term , presumably until retirement. Thirdly, the judge found the termination to be cavalier, even though the only the termination was not nasty, there was no allegation of cause and therefore it looked like it was done on a whim. This was also a summary judgment motion, which is somewhat surprising.

b) Rule of Thumb

There has developed a practice of judges to do the reasonable notice analysis along the lines of Madame Justice Malloy in Mckay v Camco 31 ccel 2d 295.

The approach of the judge is as follows.

1) she starts with the rule of thumb that for every year of service you get one month of notice. I commented on the inaccuracy of this assumption in an artice in 31 ccel 311, but judges seem to do it anyways.
2) Then she looks at the other traditional Bardal factors, other than seniority, and adjust the notice period up or down accordingly. The factors are viewed either as neutral, tend to increase the award or to decease the award. So she then looks at age, character of employment (aka position) and availability of other employment considering the employees experience training and qualifications.

This is better than the old approach where the judge simply announced the notice period without any systemic analysis. However this case simply raises the question of the relevance of the factors being considered. In some cases the following factors have been considered:

- The fact that the employee received her training through experience and not through formal education was held to lengthen the notice period.
- The fact that the employee was an aboriginal increased the period

One of the problems with this approach may be that there will be less reliance on precedent, and more reliance on the individual circumstances with no real scientific or statistical evidence to support the underlying assumptions about how these factors affect reemployability.

c) Wallace factors

This is the big one. Igor Ellyn has already explained the case but I want to talk about he ripple effect it has had on the practice.

The practice has developed that first you analyze the notice period along the Bardal lines (age, position, service and availability) and then you look for any extenuating circumstances which would lengthen the period. Wallace basically says for practical

purposes that if the termination itself is not carried out in a respectful manner, then the court will lengthen the notice period . The types of things the courts have looked at are:

- False accusation of cause or misconduct whether dropped or not
- Telling the terminated employee one reason for termination but actually having a different reason
- Doing a Gestapo type termination
- Defaming the employee
- Refusal to give a reference
- Making a mountain out a mole hill , as in treating too seriously what the court considers minor issues or simply lack of judgement.
- Failure to pay Employment Standards Act minimums

I will be delivering a seminar in October analysing these cases and trying to see if there is a pattern to how much the notice period are increased because of the Wallace factor.

Confusion Over the Sylvester case

The consensus in Ontario prior to Slyvester was that our Court of appeal got the issue of disability benefits right when they said that the two payments do not overlap as they compensate the employee for different reasons. The SCC screwed things up with Slyvester in which they now treat cases differently based on what the parties intended, that is did they intend that sick leave benefits were to be in addition to or as part of damages for wrongful dismissal.

The obvious problem with this approach is that employers and employees simply never address these matters at the time of hiring. The Courts then look to various factors to allegedly determine the intent. One of the factors that Slyvester referred to as who paid the premium for the insurance. If the employer paid it then it thought that this showed an intention to deduct sick benefits from wrongful dismissal damages. The opposite was believed to be true , that is if the employee paid the premium then he would receive both payments. Apparently the Slyvester decision means that you either get double payment or nothing, the postponing effect of Mckay v camco is out the window.

Although the slyvester decision was a poor one from a policy point of view, at least it seemed to set some easy rules for determining whether or not you deduct sick leave benefits or not. In other words the decision was stupid but at least it was clear in its stupidity.

However in practice it has turned out to be stupid and unpredictable. In Sills v CAS of Belleville 1997 30 ccel 2d 217 , Mr. J Chilcott determined that even where the employer paid the premiums for the insurance the employee was entitled to not have the sick benefits deducted from her wrongful dismissal damages as she made an " indirect contribution:" to the premiums as there were trade offs in the bargaining process.

In McKendrick v Open Learning Agency 33 ccel 2d 48 Mr. J Scarth of the BCSC held that even where the employee paid all the premiums, she still had to deduct the LTD benefits from her wrongful dismissal benefits as the evidence showed that the LTD policy was an integral part of her employment agreement, that the company was responsible for forwarding the premiums to the insurer and that it was intended as income replcement.

I have almost given up trying to figure out this area. Of course LTD is an income replacement scheme. Of course it is an integral part of the employment contract. Of course you should not receive both LTD and lost income damages for the same period. However neither should the employer profit by being in an advantageous position by saving money when they fire people on LTD or WCB. More importantly whether you get a double payment or not should not be buried in ridiculous concepts that imagine individual workers bargaining over issues like the wording in an insurance policy or determining who pays the premium.

Camco V Mckay got it right. LTD is for when you are sick and thus cannot work or look for work. Reasonable notice compensation is for when you are well enough to look for work but are unemployed You therefore get both payments at different times to cover different situations. No double payment, no discrimination for sick but unemployed workers and no inane distinctions that are based on the false concept that you can uncover the true intention or the parties when at least one of them (the employee) would never have even addressed the issue in a million years.

This line of cases is the law at its worst both for the affected parties and for lawyers who have to advise clients.

Use of Class Actions

Halabi v Becker Milk company

New Employment Standards Act procedure

Favorite case of the year

Legere v YMCA of saint John 32 ccel 2d 93 at page 95 for facst and page 100