

**COVID-19 can Favour an Enhanced Notice Period, but only with Supporting Evidence**

During the COVID-19 pandemic, much has been written about the impact of COVID-19 on the reasonable notice period. Many have asserted that it is more difficult for a terminated employee to find new employment during the pandemic, and that as a result, they should be entitled to an enhanced reasonable notice period.

This notion was alluded to in *Yee v. Hudson's Bay Company*, 2021 ONSC 387 where Justice Dow commented that terminations occurring pre-COVID-19 should not attract the same considerations as those occurring after COVID-19. These statements were taken by some practitioners to imply that the courts are recognizing a COVID-19 'bump' on reasonable notice periods for employees who have been terminated during the pandemic.

In the recent decision of *Marazzato v. Dell Canada Inc.*, 2021 ONSC 248, Justice Dow clarified that while an employee's difficulty in finding new employment as a result of COVID-19 may be a factor in favour of enhancing the reasonable notice period, a party must nevertheless lead evidence in support of this factor. Without evidence, Justice Dow stated that it would not be appropriate to speculate on the ability of an individual to find new employment during the pandemic.

**Background:**

Dan Marazzato's employment was terminated by Dell Canada Inc. on March 4, 2020 on a without cause basis. At the time his employment was terminated, Mr. Marazzato was 59 years of age, had accumulated 14 years of service, and most recently held the position of Senior Manager Director Sales.

Mr. Marazzato brought an action for wrongful dismissal. The action was brought by Mr. Marazzato for summary judgment which both parties agreed was an appropriate method of assessing and calculating damages. The motion was heard on December 9, 2020 before Justice Dow.

Mr. Marazzato sought a notice period of 20 months whereas Dell submitted that 16 months was appropriate. As part his position that a 20 month notice period was appropriate, Mr. Marazzato argued that the economic downturn caused by COVID-19 made it more difficult for him to obtain comparable employment. However, no evidence was presented in support of this position. Accordingly, the court refused lend any credence to the notion that the pandemic justifies a higher notice period. Specifically, Justice Dow stated the following:

[14] I was also asked to take into consideration the economic downturn caused by the COVID pandemic as part of this factor. This would be on the basis there would be extra difficulty in finding and obtaining a new position. In this regard, I would note no evidence of same was presented to me. Further, it would not be appropriate to speculate on that submission without evidence. For example, while there has been an economic downturn for many, Mr. Marazzato's former employer and his skill set is in the computer business which may have actually benefited from the COVID pandemic and its resulting greater use of computers for access to the internet and remote practices. The only evidence that touches on this area before me was Dell's strong financial performance to October, 2020 as reflected in its increased share price. That is

insufficient to make any concrete determination. Overall, I would conclude this factor does not favour a longer period of notice.

**Decision:**

Justice Dow held that 18 months notice was appropriate and awarded Mr. Marazzato damages for loss of base salary, short-term incentive bonus (based on a monthly average), RRSP matching contributions, value of benefits, and car allowance.

Mr. Marazzato was not awarded damages for long-term incentive bonus being restricted stock units on the basis of a contractual agreement which explicitly stated that the payment provided were for services rendered and “*were outside the scope of the employment agreement*”.

The contractual agreement went further to state that the units are “*not to be used for calculating any severance, resignation, redundancy, end of service payments, bonus, long-service awards, pension or retirement benefits or similar payments, and you waive any claim on such basis*”.

Dell was given credit for amounts paid post-termination as well as additional \$5,000 which Mr. Marazzato had earned for consulting services provided during a one month contract. The court imposed a trust in favour of Dell for the balance of the notice period which requires Mr. Marazzato to account for any future mitigation earnings during the 18 month notice period.

**Practical Take-Aways:**

1. If the COVID-19 pandemic is to be considered by the courts in assessing reasonable notice period, evidence must be provided in support. Assumptions about the economy will not be made. This approach is consistent with the court’s position in assessing failure to mitigate arguments in that actual evidence must be shown of a former employee’s alleged failure to look for comparable employment.
2. An employee’s entitlement to damages for bonus in the event of termination can be limited where the bonus plan language contains clear language which unambiguously removes the employee’s right to bonus over the reasonable notice period. Where an employee is entitled to additional compensation granted outside the scope of their employment compensation, such as restricted stock units, the language required to limit the employee’s right to bonus over the notice period may be less stringent. Employers should consult with a lawyer to review all bonus plans and termination provisions to ensure they are legally compliant and enforceable.
3. Note that while economic circumstances can be used in support of enhancement to the reasonable notice period, an employer’s specific financial circumstances cannot be relied upon to justify a reduction in the reasonable notice period [*Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801].

For further information, please contact a member of our growing team: Leslie Dizgun, Allyson Fischer, Mitchell Smith, Paul Schwartzman, Justin Anisman, William McLennan, Alyssa Jagt, and Oscar Moody.

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