

COVID-19's Effect on Reasonable Notice of Termination

COVID-19 is having significant economic impacts on both employees and employers. Mass layoffs are happening across Canada despite government initiatives to avoid them. Many employers are considering staff cuts to remain profitable. While terminating employment for legitimate business reasons (such as a downturn in the economy) is lawful, generally speaking, an employee terminated in these circumstances is entitled to reasonable notice of termination, or pay in lieu of notice.

For more information on layoffs during the coronavirus pandemic, read our earlier article:

[Are Layoffs the Right Response to Covid-19?](#)

What is Reasonable Notice?

Courts require employers to give terminated employees “reasonable notice” or pay in lieu of notice upon termination. Such notice is based on a variety of factors to assist the employee in finding comparable employment.

In doing so, the courts consider the following criteria:

1. **The character of employment.** For example, general labourer, middle manager, executive, professional, technical worker, etc.
2. **The length of the employee's service.** Employees are generally entitled to a longer notice period the longer they have been employed.
3. **The employee's age.** Employees close to retirement are generally entitled to a longer notice period.
4. **The availability of comparable employment.**

Reasonable Notice in a Poor Economy

The state of the economy can influence the availability of comparable employment and, in turn, can likewise affect the length of reasonable notice awarded by courts.

There are arguments on all sides as to how a general economic downturn should affect the reasonable notice period. Employees argue that it should be increased because they may have more difficulty finding new employment when jobs are scarce. Employers argue that they do not have the financial resources to provide employees with a longer notice period, and the pay and benefits that go with it.

Generally, courts in Ontario have favoured employees:

- They have often sided with employees that an economic downturn should extend the notice period. For example, in *Zoldowski v Strongco Corporation* (“Zoldowski”),¹ the Court increased the notice period in part because of the “economic climate of Southern Ontario and particularly the GTA”, and its impact on the employee’s ability to find alternative employment.
- They have rejected the idea that a specific employer’s economic difficulties are a basis for reducing the reasonable notice period. In *Michela v. St. Thomas of Villanova Catholic School* (“Michela”),² the Court of Appeal rejected this argument, reasoning that the “character of employment” factor was about the nature of the employee’s position, not the employer’s finances. While those finances may be the reason for the termination, “they justify neither a reduction in the notice period in bad times nor an increase when times are good.”

Nevertheless, COVID-19 may have a Different Affect on Reasonable Notice

Despite its decision in *Michela*, the Court of Appeal left open the possibility that a more general economic crisis may limit the reasonable notice period by approving and referencing the following passage in a 1982 High Court decision, *Bohemier v. Storwal International Inc.* (“Bohemier”):³

It seems to me that when employment is unavailable due to general economic conditions, there has to be some limit on the period of notice to be given to discharged employees even if they are unable to secure similar employment within the notice period.

The reasoning in *Bohemier* suggests that, where there is a general economic downturn, evidence of difficulty finding a job cannot be used to extend a notice period as was done in *Zoldowski*. Employers may still have to provide a lengthy notice period based on the other factors, but not one that is unreasonable in the circumstances of the broader economy.

¹ 2015 ONSC 5485

² 2015 ONCA 801

³ 1982 CanLII 1764 (ON SC), var’d on other grounds, 1983 CanLII 1956 (ON CA)

As a result, it is unclear how the general economic conditions created by COVID-19 will affect the reasonable notice period.

While employers ordinarily have difficulty relying on their financial hardship to reduce an employee's notice period, COVID-19 is posing new legal challenges and how the law may evolve in the face of them is uncertain.

What is certain, however, is that we have entered unprecedented times. As always, we recommend that employers avoid premature layoffs or terminations without first seeking legal advice and understanding the consequences of those decisions.

This publication is intended only to provide general information. It should not be relied on as legal advice. For specific legal advice, please contact: [Leslie Dizgun](#), [Allyson Fischer](#), [Lorne Honickman](#), [Justin Anisman](#), or [William McLennan](#).