

KEY FACTORS HR PROFESSIONALS NEED TO KNOW WHEN DETERMINING SEVERANCE PACKAGES



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Dealing with terminations

Terminations can be risky terrain for even the most experienced HR professional. [In a recent Alberta decision](#),¹ an employer suggested that 18 months' notice would be reasonable for a 25-year employee. The judge in the case awarded the ex-employee 24 months.

When an employer decides to terminate an employee, they face a situation rife with risk and uncertainty. While statutory minimum entitlements are prescribed by legislation, determining reasonable notice is a substantial challenge. When is an employee entitled to reasonable notice? Who determines what is a "reasonable" notice period, and what factors influence reasonable notice?

The risks of getting it wrong can be significant. If an employee is dismissed without cause and given insufficient reasonable notice, the employer may then be liable for the amount to which the employee is entitled under common law and thus vulnerable to potentially contentious litigation.

This whitepaper will provide readers with a better understanding of reasonable notice so that employers can offer a reasonable notice period that is fair to both parties, thereby reducing potential litigation risks.

Termination, Severance, and Reasonable Notice

Most employment relationships are governed by provincial, federal, or territorial employment standards legislation. The statutes dictate the minimum amount of termination pay and severance pay to which an employee is entitled when they are terminated without cause.

In Ontario, for example, an employee who has been continuously employed for more than 3 months but less than 1 year would be entitled to 1 week of termination pay pursuant to s. 57 of the *Employment Standards Act*. They would not be entitled to severance pay, as severance pay is only available in certain circumstances when the employee has served for more than 5 years.

These statutory minimums are just that: minimums. Employers should be aware that employees terminated without cause may also be entitled to reasonable notice at common law. If an employer fails to provide reasonable notice, an employee can claim to have been wrongfully dismissed and seek the reasonable notice to which they may be entitled through litigation.

Factors typically considered in determining reasonable notice

In contrast to the straightforward calculations that comprise termination and severance pay, reasonable notice is an entitlement at common law and much more difficult to determine accurately. Because the specifics of each situation can vary significantly, following internal rules of thumb and averaged results from different cases can be an imprecise and imprudent practice.

You are likely already familiar with the four factors that can affect the length of reasonable notice:

- The character of the employment
- The length of service
- The age of the employee
- Availability of similar employment, having regard to the experience, training and qualifications of the employee

Lawyers commonly refer to them as the “Bardal factors”. The above factors were outlined in the leading case of *Bardal v. The Globe and Mail Ltd.*, 24 D.L.R. (2d), and in the six decades since that decision, they have formed part of judges’ considerations when determining reasonable notice.

New factors influencing reasonable notice: beyond the standard four

There are numerous other factors that inform the Bardal factors listed above. When faced with unique individual scenarios, it can be difficult to ascertain which factors will make the biggest difference in a given situation.

After applying machine learning to hundreds of past reasonable notice cases, we’ve found that there are several factors that affect the amount of reasonable notice, including:

- Whether the employee was induced to leave their previous job to join the employer
- Whether the employee suffers from medical issues
- Whether the employee had a senior role
- Length of service in their occupation or industry, including time at the hirer
- Years of formal post-secondary education
- Whether the employee relocated solely to work for the employer
- Whether the employee’s position was unique and highly specialized
- The employee’s documented performance
- Whether the employer terminated the employee due to financial difficulty

In order to ensure that you have fulfilled your obligation to provide reasonable length of notice to a terminated employee, it is important to consider the above factors. However, mere enumeration of the factors isn’t the most effective way to ensure that you are offering the appropriate amount of reasonable notice to a terminated employee.

Harnessing artificial intelligence: reduce risks and make confident offers

There is now software that uses artificial intelligence in order to synthesize the information from hundreds of past cases in order to make predictions about new situations. For example, an HR professional tasked with determining the appropriate severance package for an employee would be able to use software powered by artificial intelligence in two steps.

First, the software gathers information from the user about the situation at hand. The tool considers numerous factors, including those listed above, that have been determined to influence a court or arbitration panel’s decision-making.

Second, the software uses machine learning to compare the information provided by the user to patterns found in the data from previous cases decided in court. The software then provides a prediction for what would be considered a reasonable amount of notice for that particular employee in that particular situation.

While there are existing tools that purport to accurately predict reasonable notice, they are either limited in the factors they consider or they rely on simple averages of court awards. Artificial intelligence, however, is able to provide a much more dynamic and nuanced analysis because it has been trained on hundreds of past cases. The software assigns appropriate weights to each factor based on its learnings from the cases. On average, the software’s predictions are within 8% of the actual notice period awarded in a case.

Artificial intelligence is at its best when paired with human judgment. The software is not a replacement for professional expertise, but it provides an objective and sound prediction of how a court would rule in new circumstances. Far from replacing HR professionals and lawyers, artificial intelligence can enable them to know where they stand and make confident, timely decisions, whether that means finalizing a severance package or deciding to consult internal or external counsel.

References:

¹*Jones v. Temple Real Estate Investment Trust*, 2018 ABQB 606