

THE WORKING NOTICE PERIOD: WHAT EMPLOYERS SHOULD KNOW

A recent decision of the British Columbia Court of Appeal serves as a warning to employers of the risks of providing inadequate notice of termination.

The plaintiff, Mr. Giza, was 61 years-old at the time of his termination. He had been employed as a bus driver for approximately five years. Upon termination, Mr. Giza's employer provided him with approximately five weeks' working notice in accordance with British Columbia's Employment Standards Act. Mr. Giza chose to reject the working notice and subsequently sued his employer for wrongful dismissal.

At trial, the judge found that the working notice provided to Mr. Giza was inadequate, but he had breached his employment contract by refusing to work after receiving working notice and, therefore, he was not entitled to damages. This finding reflects the principle that absent an objectively intolerable working environment, an employer can insist on a period of working notice after terminating someone.

The Court of Appeal found that, while Mr. Giza's failure to work during the notice period was a breach of contract, his resignation did not take away his right to sue for additional pay in lieu of notice of termination. Consequently, Mr. Giza was awarded wrongful dismissal damages less the five week working notice his employer provided him.

The key point from this decision is that employers who provide adequate working notice under employment standards legislation but fail to provide additional notice at common law may still face wrongful dismissal suits even when the employee voluntarily resigns during the working notice period. The difference between the two regimes is often overlooked.

In order to limit exposure, employers are encouraged to consider the following recommendations:

- Employers should be mindful that notice requirements provided in employment standards legislation are minimums. Absent an enforceable contract limiting an employee's entitlement to these statutory minimums, in most cases, additional notice or payment in lieu will be required.
- Employers should be proactive and include a carefully constructed severance provision in employment contracts, stipulating the employee's entitlement upon termination.
- Employers should take note that, under the common law, reasonable notice of termination is based on the employee's position, length of service and their age, which in Mr. Giza's case resulted in a longer notice period.
- Employers should also remember that an employee's responsibility to work during a working notice period may depend on the work environment. An objectively intolerable work environment may excuse an employee from having to comply with a working notice period.

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OUR TEAM

PARTNERS

David Whitten

Daniel Lublin

ASSOCIATES

Cédric Lamarche

Ellen Low

Aaron Rousseau

REQUEST A CONSULTATION

For a consultation
please call us at
416-640-2667.

Whitten & Lublin
141 Adelaide Street W,
Suite 600,
Toronto, Ontario,
M5H 3L5,
Tel (416) 640 2667,
Fax (416) 644 5198

www.canadaemploymentlawyer.com
www.toronto-employmentlawyer.com

