How Long And How Much?: Figuring Out Notice Periods And Damages Where an Employee Leaves Without Proper Notice

March 01, 2017

How much notice does an employee have to provide if they intend to resign from their employment? And what costs can be claimed by a company for a failure to provide that notice?

These two questions are rarely considered by the courts because it is difficult to prove damages and those damages are usually modest, relative to the costs of pursuing them in litigation. Typically, a claim for the failure to provide notice is only made and viable in the context of a lawsuit where the employee has left and is alleged to be wrongfully competing. That was the precise scenario in *Consbec Inc*. v. *Walker*, 2016 B.C.C.A. 114, where the British Columbia Court of Appeal recently considered both questions.

Mr. Walker had worked in Kamloops for five years as an estimator for a company that provided drilling and blasting services to the mining industry. Mr. Walker resigned, without providing any notice, to start a company in the same industry. Consbec sued Mr. Walker for various alleged breaches of his duties in forming a competing company, including a failure to provide any notice prior to resigning.

The trial judge sided with the company on the issue of a failure to provide notice and awarded Consbec approximately $56,000 in damages. This amount represented the company's travel and moving costs, including the cost of sending an employee to Kamloops to temporarily assess the situation and reassure customers after Mr. Walker's departure, and to permanently relocate another employee.

Mr. Walker appealed. The Court of Appeal sided with Mr. Walker on the issue of notice, concluding that the trial judge's approach to the claim and damages was flawed.

The Court of Appeal said the first step, not undertaken by the trial judge, was to determine the appropriate period of notice that ought to have been provided by Mr. Walker. The Court affirmed that an employee has an obligation to provide notice, and that the purpose of the notice is to give the employer a reasonable time to adjust to the employee's departure. In determining the appropriate notice period, the Court stated that "regard should be had to the employee's duties and responsibilities, salary, length

of service, and the time it would reasonably take the employer to have others handle the employee's work or to hire a replacement." All of these factors are obviously similar to those considered when an employer is terminating an employee without cause.

Applying these factors, the Court determined that Mr. Walker ought to have provided one month's notice. In reaching that determination, the Court noted that the employee was an estimator who had little authority and was a manager in title only.

The Court of Appeal said the next step was to determine what damages, if any, flowed from Mr. Walker's failure to give one month's notice. The Court noted that the focus is not on the costs incurred by the company as a result of the departure but rather on the costs incurred as a result of the failure to give reasonable notice.

The Court of Appeal allowed approximately $5,875 in transportation costs relating to the employee that was required to be "on the ground" in Kamloops to carry on business after the abrupt departure of Mr. Walker. However, the Court of Appeal refused to allow any costs associated with the relocation of the permanent employee to Kamloops, reasoning that these costs would have been incurred even if Mr. Walker had provided notice.

In a final twist, the Court of Appeal took into account the approximately $6,000 the company had saved by not having to pay Mr. Walker during the one month notice period. As this savings was greater than the $5,875 in costs incurred, the Court of Appeal concluded that Consbec had suffered no damages. Consbec was awarded nothing.

This case is important for several reasons.

It highlights that employees do owe a duty to provide notice of their resignation, and it provides some guidance for determining the appropriate notice period. For more junior employees, typically that period will be two to four weeks but it could be much longer for a senior executive. If a specific notice period is required, then it is always preferable to specify what is required as a written term of employment.

The case is also important because it highlights the difficulty of proving damages where an employee has provided no notice. In most cases, as evidenced by this case, it will be difficult to prove any damages and, even in cases where recoverable damages have been incurred, after taking into account any savings, likely the costs of litigation will be much higher than those damages and not worth pursuing. For this reason, employers may feel aggrieved by a failure to provide notice but will have little recourse that is practical to pursue against the former employee.

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