Liability for layoffs in a declining economy

Peter Bowal, Irene Wanke,

Law Now, Oct/Nov 1998, Vol. 23, Iss. 2; pg. 17

Introduction

Dismissal continues to be one of the principal concerns of employment law and of Canadian workers. The common law developed over time largely governs dismissals for those who are not unionized, about two out of every three employees. Over the last century, judges have been sympathetic to employees who need to earn a livelihood, and who at the same time exert little control over security in their jobs.

There is no general duty of an employer to provide work at all times during the course of employment, unless remuneration is by commission or where work confers other palpable benefits on the employee as in the case of an actor's or manager's reputation, as indicated in the BC case (Park v. Parsons Brown & Co., 1989). But what about termination of the employment due to a shortage of work? Can an employer successfully maintain that the employee should share in the hardship of unfavourable economic conditions when the job ends?

We know employees can be summarily dismissed if adequate grounds for cause for firing can be established by the employer. However, most dismissals are not firings for cause, but layoffs with reasonable notice or compensation for the duration of that reasonable notice period. Judges have developed the rule that any indefinite non-unionized employee can quit or be dismissed by giving reasonable notice to the other side. The length of the period is often a piece of guesswork, being dependent on many factors, the most important being how long the employee has served with that employer.

Layoffs and Economic Conditions

This notice period is required to fairly afford the soon-to-be laid off employee with enough time to find alternative work, without an interruption of earnings. This was recognized as long ago as 1876, where it was pointed out that reasonable notice gave, "... the servant a fair opportunity of looking out for and obtaining another situation, instead of being thrown suddenly and unexpectedly upon the world, with, it may be, a wife and family to support and no means, either from savings or otherwise, of supporting either himself or them."(Morrison v. Abernethy School Board)

Nevertheless, in our rapidly changing, digital economy, many employees laid off in certain age categories-with limited breadth of experience, transferable skills, and potential for re-training-will find little prospect for alternative work, nor work to which they were accustomed.

The objective of the notice period, while feasible in the past as a cushion for employees between jobs, cannot be extended indefinitely for laid off employees who find themselves essentially unemployable. It does not extend to retirement age.

The employer who lays off employees is usually limited to a monetary commitment or cushion that served an historical model of a job-rich economy for everyone. In other words, the employer today is generally not responsible for its laid-off employees' extra difficulties in finding alternative employment, due to economic conditions, demographic shifts, and trends. The employer's liability will be primarily determined on other historical criteria relating to the relationship.

Another way to see this is that the requirement of employers to grant notice of layoffs allows them to transfer the risk of a declining macro-economy to the employees. We could speculate then as to whether it may some day seem reasonable that the employer expect the employee to share part of the risk of a shortage of work during the employment. That is to say, could the reasonable notice period to the employee be further reduced if the essential reason for a dismissal is economic sluggishness.

Competing Arguments and Interests

Employees' viewpoint

* Reducing notice periods due to economic downturns would seem to be the opposite of the cushion theory of notice periods. These periods were designed to give the employee (who is not at fault for economic downturns) some time for transition with least interruption of income into new employment.

* While the employee may be willing to accept the risk of long-term structural changes in the economy, the sudden or short-term shortage of work is conceptually part of the management function. A sudden (within the notice period) shortage of work may be poor planning or management. The employee usually cannot influence management functions, and should not be punished for bad management.

* One of the characteristics of employment, compared to serving as an independent contractor, is the protection package for employees. If employers want really flexible service providers, they should independently contract for them on an as need basis if they are not willing to buy out the lease on employees.

* Since employees have no right to share in the upside of good employer performance beyond what they have contractually agreed to, it is logical that their position in the event of poor employer performance should not be eroded or arbitrarily revoked. If this were not the case, full time, indefinite employment might be reduced to minute-to-minute employment at the whim of the employer, on the basis of available work.

* One should also not forget that historically the law has treated employment as more than a mere contract, but as a relationship calling for fairness and loyalty. Most often, employers are financially better equipped to absorb economic risk, than individual employees.

Employers' viewpoint

* The marketplace is getting increasingly competitive. Many companies have to bid for work and need flexible workers. They often are not able to assess their workforce needs well in advance. To buy out the lease on employees for shortage of work cases needlessly increases the cost of doing business. This makes them less competitive, and they may not be able to offer traditional standby employment as much.

* Economic conditions change quickly. The law should catch up to economic and business reality - for example, the competitive economy, the value of the dollar, or interest rates - are not something that an individual employer has control over. It too, therefore, is often blameless in any loss of work.

* The cushion approach is an out-moded social program, which may be better funded and administered by public policy. In some cases, the employee even obtains a windfall, where notice periods are paid out for lack of work and the employee finds replacement employment well within that period.

* The employer is asking for the employee merely to take some share of the risk of economic decline, not all the burden. Where they allege that the layoffs were caused by economic cycles, they might be required to prove this was the cause of the layoff.

No Reduction of Notice Period

The issue of whether employees should bear some of the risk of a poor economy by forfeiting notice period has divided the courts for the reasons above. The preponderance of judicial authority, however, holds that neither wealth or poverty of the employer will lead to a shortened period of reasonable notice or payment in lieu. For example, corporate directors may be personally liable for up to six months of unpaid wages when the corporation defaults in payment of them. Judges have always enlarged the common law notice periods beyond the minimum periods provided by statute (see for example, Alberta's Employment Standards Code , 1988).

Deteriorating economic conditions are often noted by judges setting notice periods in dismissal cases, even though it was not historically a factor in the calculus (Bardal v.The Globe & Mail Ltd, 1960). They apply them in different ways. In Nicholls v. Richmond 1984, Judge McLachlin (now a member of the Supreme Court of Canada), wrote, "worsening economic conditions should not be taken into account in fixing the length of notice" and that it is "entirely out of the employer's control ... to insure the employee against the impact of unforseeable future events unrelated to employment."

Yet is has been difficult for judges to ignore economic conditions in their determination of notice period. In Russell v. Winnifred Stewart Assn for the Mentally Handicapped 1993, the economy was found tobe no reason to extend notice length. However, in other cases, most prior to the mid-1980s, some extra notice period was awarded precisely because the poor economy meant that the employee would have a harder time finding work.

In Hunter v. Northwood Pulp and Timber Ltd, 1985, the court stated: "while one must take account of the lack of available employment opportunities resulting from a depressed economy,

one must not give undue emphasis to this factor. The length of notice was not equivalent to the period required to find new employment." This remains faithful to the cushion theory.

The employer's position for not increasing notice, and maybe even reducing it, due to an economic downturn, received some temporary judicial acceptance in 1982 in the case of Bohemier v. Storwal Int. The court reasoned that this was to place an extra economic hardship on the employer in a recession. It would "unduly impair or render illusory" the employer's ability to dismiss workers in a declining economy. Some have criticized the rationale for having the employee share in the economic downturn in this way because, among other reasons, employees feel the injury of an economic decline more proportionally and personally than shareholders and employers.

They also suffer psychological injury, although the question remains as to how much the employer should be the economic and psychological insurer of its workforce.

The Bohemier case, which reduced notice periods for economic downturns, has been unevenly followed. A few decisions have applied it strictly, but most have ignored it. An early study of cases from 1980 to 1986 found that employees in British Columbia were awarded an average of 3.5 months more notice if they faced difficult labour market conditions at the time of dismissal. (S. McShane and D. McPhillips, "Predicting Reasonable Notice from Canadian Wrongful Dismissal Cases" 1987, Industrial & Labour Relations Review)

Conclusion

Another approach to use is for judges to lengthen the notice period where the employer knew, or should have known, of the impending layoffs, yet the employer waited to the last minute to inform the employees (McBride v. W.P. London & Associates Ltd. 1984 and Ahmad v. Procter & Gamble Inc. 1991). On the other hand, provincial employment standards legislation often carries a provision such as "termination notice is not required if the contract of employment is or has become impossible for the employer to perform by reason of unforseeable or unpreventable causes beyond the control of the employer." This has not been invoked to date to reduce or waive the notice period in circumstances of the declining economy. Even if it was, it would not likely have any impact on the more generous common law notice decisions.

The trend in employment law notice periods, if anything, is to continue to enhance this cushion protection for employees. It is well accepted that business takes the risks associated with its business. The employee should not be expected to share in this risk. The recent Supreme Court of Canada decisions of Farber (dealing with constructive dismissal), Dowling v. City of Halifax (near cause rejected as a principle of Canadian employment law), and the Wallace v. United Grain Growers (notice periods extended for bad faith of employer) all suggest that employees' notice periods are secure.

Peter *Bowal* is Professor of Law, Faculty of Management, University of Calgary.

Irene Wanke is Assistant Professor, Faculty of Medicine, University of Calgary.