WORKING NOTICE: WHAT EMPLOYERS SHOULD KNOW

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I. INTRODUCTION

When terminating an employee, an employer has the option of providing that employee with working notice or pay in lieu of notice. Generally, an employee does not have the option of refusing the working notice and demanding pay in lieu instead. Thus, if working notice is given by the employer, the employee is obligated to continue working until the end of the notice period unless he or she chooses to resign before the end date.

The effect of working notice raises important issues regarding the rights and obligations of employers and employees on termination of employment. The benefit of working notice to employers is obvious, as it provides the opportunity to retain an employee’s services and thus yield productivity and value, while significantly reducing the costs associated with termination. However, there are several issues that must be considered when assessing whether to provide working notice or pay in lieu of notice, and once an employer makes the decision to provide working notice.

II. DECIDING WHETHER TO GIVE WORKING NOTICE

Working notice, while likely the less expensive model, may not be practical in many situations. A major consideration is the possible employee responses to working notice. In some cases, particularly in the cases of very senior employees or those with access to confidential information and documents, working notice is often not the preferable choice. Employees on working notice have access to the employer’s computer system and confidential business records. There is a risk the employee may make copies of client contacts and information, which can be damaging to the employer in the event that the employee begins employment with a competitor or starts a competing business. Furthermore, employees may hold a grudge against the employer upon termination. In such a case, the employer also runs the risk of vindictive or
retaliatory behaviour. Many employers prefer to minimize the risk of potentially damaging behaviour by offering pay in lieu of notice.

Given these risks, some issues to consider in choosing between working notice or pay in lieu of notice are as follows:

- the reason for the termination (e.g. poor performance v. closing of a department)
- the seniority of the employee;
- the motivation of the employee (i.e. whether the employee will continue to be productive);
- the personality of the employee;
- the level of access to confidential information that the employee has;
- the potential for the employee to bring information to a competitor;
- the employee’s relationship with the company; and
- the risk of damage to the company.

The risks of providing working notice may decrease in cases of the closure or significant downsizing of a business, where more than one employee is affected. In such cases, the personal element of the termination is absent, making the risk of inappropriate behaviour during the working notice period less likely.

Therefore, in certain closing or downsizing situations, an employer may wish to provide incentives to make working notice more attractive to terminated employees. For example, an employer could provide job placement services to employees and time off for interviews to help them in their search for a new position. An employer could also offer to provide an employee with a stay bonus for remaining and performing at a certain level or achieving a certain target. This may be a particularly attractive option in a closure setting where it is important to keep employees until the final day of operation.
III. EMPLOYEE OBLIGATIONS IN FULFILLING THE WORKING NOTICE PERIOD

It cannot be predicted how an employee will respond to being provided with working notice of termination, and often the response is negative. In fact, one Ontario Superior Court judge pronounced that “[w]orking notice is an institution almost invariably predestined to fail”,¹ in considering the case of an employee who had received eight weeks of working notice of dismissal. Upon receiving the notice, the employee became so disruptive and uncooperative that the employer purported to terminate her immediately for cause. Significantly, the Court held that the employer could not dismiss the employee for cause when the consequences of working notice were so readily foreseeable.

Of course, not all courts will be so forgiving of employee misconduct that occurs during a period of working notice. However, employers should be cautious about electing to keep a terminated employee on during the notice period. Even if the employee is not disruptive or uncooperative, the question arises as to the level of attendance an employer is entitled to expect from employees working out their notice period. This issue arises from the fact that one of the main purposes of reasonable notice is to afford the employee time to secure new employment.

The Ontario case of Kontopidis v. Coventry Lane Automobiles Ltd.² considered this issue. The employee in this case sued for wrongful dismissal upon being dismissed for cause after having been given four months of working notice. After Kontopidis was given working notice, his attendance became a matter of concern for the employer. The employer thus directed Kontopidis to advise his secretary or his manager before leaving the premises during working hours. He was subsequently warned that failure to comply would result in his termination. One week after this warning, Kontopidis left work at 11:00 a.m. and did not return that day. On his return to work, he was terminated for failing to comply with the employer’s directive.

The trial judge observed that it was clear that Kontopidis’ attendance had become problematic and that he was less than motivated to work. The judge held that the employer had cause for dismissal, although she noted that Kontopidis probably felt affronted at having to comply with what he considered to be unnecessary and unreasonable conditions. The judge stated as follows regarding the extent of an employee’s attendance obligations during working notice:

Working notice is difficult on both the employer and the employee and can lead to problems in the employment relationship. However, the employer is entitled to require full attendance and to impose reasonable conditions to ensure full attendance.3

The conclusions of the Court in Kontopidis should perhaps be read with caution, as had there been any evidence that the employee had been absent from work to search for new employment, the result might have been different. In this case there was little evidence that Kontopidis had provided any explanation for his absences.

In fact, the New Brunswick Court of Appeal adopted a very different approach from that taken in Kontopidis in Bramble v. Medis Health and Pharmaceutical Services Inc.4 This case involved a number of employees who were given fifteen weeks of working notice, after which they were to receive a separation allowance as long as they attended work regularly during the notice period. The employees successfully brought an action alleging that the employer had failed to provide reasonable notice of termination. The employer appealed the notice periods awarded to the employees at trial.

Importantly, the Court of Appeal rejected the employer’s argument that the fifteen week period of working notice should be factored into the employees’ entitlement, noting that the trial judge had found as a fact that the employees had not been able to look for work during the working notice period. The Court held that to accede to the employer’s argument would “permit formalism to triumph over substance” and be unjust

3 Ibid. at para. 33.
to the employees.\(^5\) The Court emphasized the relevance of an employee’s opportunity to seek alternate employment while on the job, stating:

[The] primary objective of notice is to provide the dismissed employee with a fair opportunity to obtain similar or comparable employment. It follows that the weight to be given to a particular working notice will vary depending on the quality of the opportunity it gives the employee to seek an alternate position. In this particular case, the trial judge’s finding of fact that the respondents could not actively seek work during the working notice period deprives the latter of any legal value. As a result, no weight can legitimately be attached to it.\(^6\)

The lesson appears to be that when considering absences, employers should be careful to allow a dismissed employee a reasonable opportunity to seek new employment, or else face the risk that the notice period granted will be deemed invalid by a court.

IV. NO LEGAL DIFFERENCE IN WORKING NOTICE AND PAY IN LIEU

According to \textit{Taylor v. Brown},\(^7\) a decision of the Ontario Court of Appeal, there is no legal difference between the amount of working notice and pay in lieu of notice owing to an employee. An employer cannot convert an offer of working notice of a certain period to a lump sum payment for a shorter period during which the employee need not work.

\textit{Taylor} involved an employee who was terminated with 18 months working notice after 21 years of service. The termination notice and the recent death of Taylor’s immediate supervisor, who she regarded as a close friend, caused her distress and she was advised by her physician to take stress leave. While she was on leave, the employer decided to terminate her immediately with six months of pay in lieu of notice. Taylor went to court to recover the original notice.

\(^5\) \textit{Ibid.} at para. 75.
\(^6\) \textit{Ibid.} at para. 80.
\(^7\) [2004] O.J. No. 4650 ("Taylor").
At trial, the judge ruled that the employer was precluded from unilaterally reducing the notice, however, without giving reasons, he reduced the notice to 12 months of pay in lieu of notice. Taylor appealed this award, and the Court of Appeal ruled in her favour. The Court stated that the issue in the case was whether there was any legal difference between working notice and pay in lieu of notice that entitled the trial judge to substitute 12 months of pay for 18 months of working notice. The Court held there was no difference, despite the fact that a working notice made it more difficult to find alternate employment:

While the purpose of the notice period is to provide time for employees to find alternate employment, a task made more difficult while the employee undertakes to fulfill the terms of working notice, we are of the view that there is no functional difference at law between working notice and payment in lieu of notice.

Proper notice of termination is an implied term of the contract of employment; payment in lieu of notice is not. We agree with the opinion of [the British Columbia Court of Appeal in Dunlop v. British Columbia Hydro and Power Authority …] that payment in lieu of notice is seen as "an attempt to compensate for [the employer's] breach of the contract of employment, not as an attempt to comply with an implied term of the contract of employment". The quantum of a payment in lieu of notice, therefore, is not calculated in accordance with the terms of the contract, but rather is a means by which an employer may terminate an employee contrary to its common law duty to give reasonable notice of termination, without incurring any liability.8

The Court noted that because the offer of 18 months was reasonable, the second offer of six months was not reasonable. There had been no change in any of the relevant factors for determining reasonable notice in the three-week period between the two offers.

Taylor does not depart from previous decisions on pay in lieu and working notice. It appears to be well settled that the employer is not permitted to reduce the reasonable notice period owed to an employee upon termination simply because it intends to pay an up-front, lump sum amount.

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8 Ibid. at paras. 14-15.
V. WORKING NOTICE AND MITIGATION

It is well established law that employees have a duty to mitigate their damages to the greatest extent that is reasonably possible in the circumstances. Whether an employee refuses to work during the working notice period is somewhat analogous to an employee who refuses an offer of re-employment from an employer, an issue that has been considered by the Supreme Court of Canada. Employers should note that in defending a wrongful dismissal claim, it can be argued that an employee did not properly mitigate his or her losses if the employee quits and refuses an offer of working notice.

In *Evans v. Teamsters Local Union No. 31*, 9 Evans was employed for over 23 years as a business agent in the respondent union’s office and was dismissed after the election of a new union executive. Evans argued that he was prepared to accept 24 months’ notice of termination and suggested that this could be granted through 12 months of continued employment followed by a payment of 12 months of salary in lieu of notice. Evans subsequently received a letter from the union’s legal counsel requesting that he “return to his employment ... to serve out the balance of his notice period of 24 months” and stating that, if he refused to return, the union would “treat that refusal as just cause, and formally terminate him without notice”. 10 Evans sued for wrongful dismissal.

The trial judge found that Evans had been wrongfully dismissed and that the union had not shown that Evans had failed to mitigate his damages. Evans was awarded over $100,000 in damages. The Court of Appeal set aside the damage award, holding that Evans had failed to mitigate his damages by refusing the job offer made by the union.

Appealing to the Supreme Court of Canada, the union argued that Evans’ failure to return to his workplace should have been viewed as a failure to mitigate. The Supreme Court of Canada agreed. By offering Evans his old job back on the same

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terms as before, the union was able to show that a comparable job was open and it was not reasonable in the circumstances for the employee to decline it.

Based on this decision, employers should note that former employees who are offered a bona fide chance to return to work may be required to accept, unless they can objectively show that there is an atmosphere of hostility, embarrassment, or humiliation in returning.

VI. VACATION PAY DOES NOT CONFLICT WITH WORKING NOTICE

The Alberta Court of Appeal’s decision in *Deputat v. Edmonton School District No. 7*,¹¹ determined that combining working notice and vacation time together did not result in an inconsistency or a double deduction from the employee during the working notice period. The employee is either able to stay at home and be paid, or receive compensation for vacation days which were not taken by the end of the working notice period.

In *Deputat*, the employee was terminated after 24 years of service and given a notice period of one year, which he decided to work through. The employee had banked more than thirty days worth of holiday time, which was against an existing written policy stating that no more than thirty days of holiday could be banked. The employer requested that the employee take some of this extra holiday time off during the working notice period and the employee complied. Once the period of working notice had finished, the employee sued the employer for wrongful dismissal.

The Trial Judge found that the notice period should have been eighteen months instead of one year, and that the employer should not have combined the holiday time with the working notice period because this reduced the employee’s notice period. The employer appealed this latter point. The Court of Appeal decided that the Trial Judge had erred in concluding that combining holiday time and working notice resulted in a reduced notice period, stating:

¹¹ [2008] A.J. No. 22 ("Deputat").
Working notice and taking paid vacations are perfectly compatible. There is no inconsistency, and no double deduction … The employee lost no holiday rights. For every day of holidays he had earned, he either stayed home and was paid, or he got an extra day’s pay at the end without working.\textsuperscript{12}

Additionally, the Court found that implied through the employer’s holiday policy was the inability for an employee to accumulate holidays past this limit by working through them and then receiving extra pay. The Court stated that this policy stopped the Court from implying a term in the employment contract that an employee had a right to bank over 30 days. It also barred implying a term that an employee has a right to work every working day and take extra pay instead of any holidays.\textsuperscript{13}

\textit{Deputat} demonstrates that employees are not permitted to use the notice period as a means to maximize the amount of compensation they will receive from their employer. An employee is not entitled to an increase in the notice period because some of that time was spent on holiday.

\textbf{VII. QUITTING DURING THE WORKING NOTICE PERIOD}

The issue of quitting during the notice period has been the subject of several British Columbia Court of Appeal decisions, the most recent decision being \textit{Giza v. Sechelt School Bus Service Ltd.}\textsuperscript{14} The Court of Appeal held that the employee, who quit his job immediately after being given working notice of termination, was nevertheless entitled to sue for damages for wrongful dismissal for the period of reasonable notice the employee should have received in excess of the working notice given.

\textit{Giza} marks a departure from previous case law in British Columbia. Prior to \textit{Giza}, two decisions of the British Columbia Court of Appeal, \textit{Suleman v. B.C. Research Council}\textsuperscript{15} and \textit{Zaraweh v. Hermon, Bunbury & Oke},\textsuperscript{16} were the leading decisions in

\textsuperscript{12} \textit{Ibid.} at paras. 14-15.
\textsuperscript{13} \textit{Ibid.} at para. 21.
\textsuperscript{14} 2012 BCCA 18 ("Giza").
\textsuperscript{15} [1990] B.C.J. No. 2707 ("Suleman").
\textsuperscript{16} 2001 BCCA 524 ("Zaraweh").
British Columbia on the effect of insufficient working notice and the effect of commencing a law suit for wrongful dismissal once notice has been given.

*Suleman* involved an employee claiming damages for wrongful dismissal equivalent to eight months of her salary. Suleman had received six months working notice from her employer. Upon receipt of the termination notice she immediately commenced a law suit claiming damages for wrongful dismissal. In her Statement of Claim she alleged constructive dismissal by reduction of her workload by fifty percent. The trial judge found that Suleman was given inadequate notice, and awarded damages for wrongful dismissal based on an eight month notice period. In doing so the trial judge took the view that neither the commencement of the action nor the pleadings alleging constructive dismissal required a conclusion that the employee must be taken to have repudiated her contract of employment.

The Court of Appeal disagreed and allowed the appeal from the decision. The Court of Appeal held that the commencement of the action was either an acceptance by Suleman of a constructive dismissal, if she could establish that result, or a repudiation of her contract of employment if she failed to establish that result. The Court held that:

> the contract of employment is not terminated until the end of the notice period and during that period the employer has the right to the services of the employee. It follows that the employee must remain ready and willing to carry out the contract of service. In the present case, the named day was March 31, 1987. It was not until that date that the cause of action accrued for the alleged breach of the contract to continue the relationship.\(^{17}\)

The claim was dismissed, as the employer had made out its case of a repudiation by Suleman of her contract of employment.

The case of *Zaraweh* involved an appeal by the defendant partnership from a decision ordering it to pay damages to Zaraweh for wrongful dismissal on the basis that reasonable notice was ten months. Zaraweh was a 54 year old secretary and general clerical assistant who had worked for the partnership for over 11 years. On April 30,

\(^{17}\) *Suleman*, *supra* note 15 at p. 4.
1999 she was given three months working notice of termination of her employment. She considered the notice inadequate and on June 2, 1999 the partnership extended the notice to August 31, 1999 in response to her dissatisfaction. On June 29, 1999, Zaraweh filed a law suit for damages for wrongful dismissal. When she served her court documents on the partnership, she was at that time continuing to work as scheduled. The employer took the position that Zaraweh had repudiated her employment contract by commencing the action, and she was sent home a few days later.

The Court of Appeal again considered the issue of suing during the working notice period, and held that the acts of issuing a Writ and Statement of Claim, and serving them on the partnership, were incompatible with continuation of the contract of employment. Absent a prior repudiation by the partnership which would allow Zaraweh to elect to end the contract, such actions would be viewed as unjustified repudiation.\(^\text{18}\)

The Court then turned to the question of the effect of the insufficient notice given by the employer. It distinguished the decision in Suleman on the basis that the statement of law in that case, specifically that the contract of employment is not terminated until the end of the notice period, was made “in a theoretical framework”.\(^\text{19}\) The Court considered it an “over-stretch” of Suleman to interpret the case as saying that an employee can never sue an employer before the end of a period of working notice.\(^\text{20}\)

The Court went on to find that the provision of inadequate notice may constitute repudiation of contract; whether it does is a question of fact, to be resolved based on the evidence of the circumstances accompanying the provision of the notice.\(^\text{21}\) It was held that the employer did not intend to repudiate the agreement, as it had engaged in discussions with Zaraweh about the notice period and had attempted to provide one additional month’s notice of termination. However, the Court also noted that the

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\(^{18}\) Zaraweh, supra note 16 at para. 21.
\(^{19}\) Ibid. at para. 27.
\(^{20}\) Ibid.
\(^{21}\) Ibid. at para. 31.
employer was not entitled to unilaterally alter the notice in the absence of agreement by the employee.\textsuperscript{22}

In the result, the Court of Appeal held that the notice period was inadequate. The provision of inadequate notice gave Zaraweh a cause of action for damages that was not extinguished by her repudiation of the employment contract. Damages were awarded based upon the difference between the original notice provided and the period of reasonable notice.

The decision in \textit{Giza} considered both \textit{Suleman} and \textit{Zaraweh} in pronouncing on the effect of working notice in the termination of an employment relationship. Giza was employed as a bus driver for a period of five years when the employer terminated him without cause, providing five weeks of working notice. When Giza received the termination letter, which was left on the seat of his bus, he returned the bus to the terminal and left work permanently. He subsequently sued for wrongful dismissal damages, seeking ten months pay in lieu of reasonable notice.

At trial, the judge held that the provision of five weeks’ of working notice was inadequate notice in the circumstances. However, because the employee left his employment immediately after receiving the termination notice he repudiated the employment agreement, effectively quitting his job which disentitled him to damages in respect of his wrongful dismissal.\textsuperscript{23}

The Court of Appeal overturned the trial decision with respect to the employee’s right to damages for reasonable notice. The Court found that quitting did not deprive Giza of his right to damages for the company’s breach of contract in providing him with inadequate notice in the first place. Even though Giza had quit after receiving his working notice of termination, his right to damages in lieu of reasonable notice had already accrued when he was given inadequate notice of termination.\textsuperscript{24}

\textsuperscript{22} \textit{Ibid.} at para. 33.
\textsuperscript{23} 2011 BCSC 669 at para. 53.
\textsuperscript{24} \textit{Giza}, supra note 14 at para. 41.
Essentially, the Court of Appeal found that although the employee’s repudiation ends the ongoing rights and obligations under the employment contract, it does not affect the rights that have already accrued by virtue of the employer’s breach of contract.\(^{25}\) Thus, Giza was found to be entitled to the difference between the reasonable notice he should have received and the actual working notice the employer attempted to provide.\(^{26}\) The Court determined that a reasonable notice period would have been six months but reduced this award by the period of working notice that Giza refused to work, for a total of five months pay in lieu of notice.

_Giza_ therefore stands for the principle that an employee who receives inadequate termination notice and quits without working through the working notice period does not lose his or her right to sue for damages for wrongful dismissal.

**VIII. CONCLUSION**

The law regarding the effect of working notice on an employment relationship continues to evolve and raises important questions regarding the rights of employers and employees. Whether to offer working notice or pay in lieu of notice is a decision that employers must consider carefully.

Working notice is not an all or nothing proposition and, subject to any contractual limitations, employers have the option to satisfy their notice obligations through a combination of working notice and pay in lieu of notice. Employees are likely required to accept working notice, unless they can objectively show that there is an atmosphere of hostility or embarrassment in returning to work. Therefore, although working notice has been offered less in recent years, in today’s economic climate working notice may be a cost effective and useful method of providing notice where the circumstances are appropriate. Of course, despite the one-to-one equivalence between working notice and paid notice, employers should consider carefully whether it is worth having employees work out the notice period. The benefits derived from having a dismissed employee provide work in return for his or her pay during the notice period can be

\(^{25}\) _Ibid._ at para. 42.

\(^{26}\) _Ibid._ at para. 48.
outweighed by the costs in terms of poor morale, substandard performance and disciplinary issues. Employers should review the feasibility of working notice, and be aware of the risks involved in deciding to grant it.