

Giving Working Notice – What you Need to Know

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by Karen M. Sargeant and Hadiya Roderique

INTRODUCTION

Working notice – employees loathe it and employers fear it. Why? If working notice provides employees with a reasonable time to find alternate employment, why don't they like it? And if working notice allows employers to get some productivity out of employees while they are being paid, why don't employers use it more often? The answer depends on the circumstances of a termination. In today's economic climate, where employees are being let go on mass, working notice may be a more palatable alternative for employers and, perhaps, employees.

WORKING NOTICE OVERVIEW

Many employers think of working notice as an alternative to pay in lieu of notice and/or severance pay. It is important to keep in mind that working notice is not the alternative. As its name implies, pay in lieu of notice is the alternative – pay in lieu of notice.

Essentially, with the exception of statutory severance pay in Ontario and under the *Canada Labour Code* which must be paid (and cannot be worked), employees are entitled to reasonable notice of the termination of their employment. Reasonable notice is working notice. It was only when employers decided that working notice was not always practical, that the courts started awarding pay in lieu of that working notice. Hence the concept in the courts today that terminated employees are entitled to everything they would have received had they continued to work during the reasonable notice period.

The benefit of working notice to employers is obvious - working notice provides the employer with the opportunity to retain the employee's services and thus yield productivity and value, while significantly reducing the cost of termination to statutory severance pay.

Compare the cost of the following two scenarios where an employer with an annual payroll of \$3 million needs to let go 20 employees who make \$52,000 (\$1,000 weekly salary) and have worked for 5 years, each of whom are being provided with five months,

comprised of 13 weeks notice or pay in lieu of notice and 5 weeks of statutory severance pay:

- Termination pay in lieu of notice + statutory severance pay: $[20 \times 13 \text{ weeks} \times \$1,000] + [20 \times 5 \text{ weeks} \times \$1,000] = \$260,000 + \$100,000 = \$360,000$
- Working notice + statutory severance pay at the end of the notice period: $[20 \times 5 \text{ weeks} \times \$1,000] = \$100,000$
 - Working notice would save the company from a \$260,000 payout upon termination.

It is important to note that working notice is the employer's choice. Generally, an employee does not have the option of refusing working notice and demanding pay in lieu of notice. 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. As a general principle, if the employee chooses to resign during the notice period, he or she will not be entitled to any additional pay from the date of resignation, but may still be entitled to statutory severance pay, depending on the timing of the resignation and whether he or she provided the employer with adequate advance notice. One exception to the above principle is in situations where it is unreasonable to expect an employee to work through the notice period for some particular reason.¹

DETERMINATION OF REASONABLE NOTICE

The determination of reasonable notice is the same whether the employer chooses to give working notice or pay in lieu of notice. In the decision of *Taylor v. Brown*², the Ontario Court of Appeal noted that while their purposes may differ, "there is no functional difference at law between working notice and payment in lieu of notice."

The factors laid out in *Bardal v. Globe and Mail Ltd.*³ largely form the basis of the determination of reasonable notice. The Supreme Court of Canada has affirmed that these factors are non-exhaustive, and additional factors have been identified in subsequent decisions. The determination of reasonable notice is an 'art, not a science',

¹ *Ahmad v Procter and Gamble*, (1991) 1 O.R. (3d) 491(C.A.)

² [2004] O.J. No. 4650

³ 1960, O.J. No 149

which must take into account the particular characteristics and circumstances of the employee.

In *Bardal*, the Court noted that “there [can] be no catalogue laid down as to what is reasonable notice in particular classes of cases”, holding that the reasonableness of the notice must be decided with reference to each particular case, taking into account the following:

- the character of the employment (the position of the employee, the importance of the work performed, the number of employees supervised and salary level);
- the length of service of the employee;
- the age of the employee; and
- the availability of similar employment having regard to the experience, training and qualifications of the employee.

Examples of other factors that have been taken into consideration include:

- the ease and/or lack of ease with which the employer will be able to find equivalent employment (of particular significance to the current economic climate and resulting economic conditions);
- evidence of the parties’ expectations;
- degree of specialization;
- enticement by employer and special reliance by an employee.

WHEN TO GIVE WORKING NOTICE

Although working notice is likely the less expensive model, it may not be practical in many situations. One must consider possible employee responses to working notice when deciding between working notice and pay in lieu of notice.

In some cases, particularly in the cases of very senior employees or those with access to confidential information and documents, working notice may not be preferable. Such senior employees 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.

Also, in the case of employees with a grudge, vendetta or problem with the company, the employer runs the risk of vindictive or retaliatory behaviour. While of course the employee could be held accountable for any such damage or even illegal behaviour, many employers prefer to minimize such a risk by offering pay in lieu of notice.

Thus, some employee issues to consider in choosing between working notice or pay in lieu of notice:

- The seniority of the employee;
- The personality of the employee;
- Motivation of the employee (i.e., will he or she continue to be productive or will his or her work product dwindle?);
- 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;
- The risk of damage to the company; and
- The likelihood that the employee may become "disabled" during the working notice period.

CLOSURES OR DOWNSIZINGS

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

Thus, in closing situations and in some downsizing situations, an employer may want to provide incentives to make working notice more attractive. The following are some examples of how to do so:

- Provide employees with time off to attend interviews for other positions during working hours.

- Provide letters of reference and/or job placement services to your employees to help them in their search for a new position.
- Provide an employee with a bonus payment for remaining and performing at a certain level (i.e., achieving certain targets). This may be a particularly attractive option in a closure setting where it is important to keep employees until the final day of operation.
- Provide an employee with a bonus if they find new employment during the working notice period and leave the payroll early. This may be particularly suited for downsizing situations.

TECHNICALITIES WITH WORKING NOTICE

Once you have decided to provide working notice, there are a few technical issues to keep in mind:

- Working notice may be limited by an employee's contract. Be sure to review the contract before structuring the package.
- Working notice is not an all or nothing proposition. Subject to any contractual limitations, employers have the option to satisfy their notice obligations through a combination of working notice and termination pay in lieu of notice.⁴
- As was outlined above, statutory severance pay cannot be "worked".
- If you provide working notice with no payment, other than statutory severance pay, upon termination, you cannot ask for a Release. If obtaining a Release is important to you, consider offering some payment in addition to statutory severance pay, in exchange for the employee signing the Release and so long as they continue working to the end of the period.
- If the employee resigns during the statutory notice period and provides the employer with two weeks notice of his or her resignation, the employee will still be entitled to his or her statutory severance pay. If an employee's statutory notice period is six weeks, the statutory notice period would be considered to be the final six weeks of the working notice period.

⁴ *McLeod v. ABM Systems Ltd.*, [1994] N.B.J. No. 12., 3 C.C.E.L. (2d) 68 (Q.B.)

CONCLUSION

Although working notice has been offered less and less in recent years, in today's economic climate, working notice may be a cost effective and useful method of providing notice. Employers should review the feasibility of working notice, particularly in dismissals due to closures or downsizings where many employees are affected.

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