

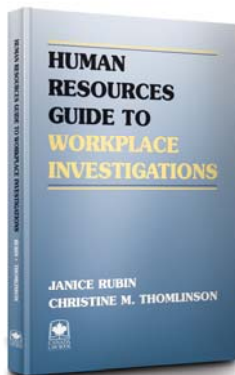
EMPLOYERS' ALERT

November 2006

Formulas May Fail When Calculating Reasonable Notice Periods For Terminated Employees

WHAT'S NEW AT RUBIN THOMLINSON LLP

We are proud to announce that our new book, "The Human Resources Guide to Workplace Investigations", co-written by Partners Janice Rubin and Christine Thomlinson, is now available through Canada Law Book.



To order your copy, please call 1 (800) 263-2937

We work with employer clients to provide optimal legal solutions to their challenging workplace issues. If you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at contact@rt-law.ca

Employers often ask their legal counsel to prepare a formula or chart they can use to determine the common law reasonable notice entitlements of employees terminated without cause. Often this is done in order to maintain consistency in severance packages, and to avoid the legal expense of performing an individualized analysis when an employee is terminated.

The recent decision by the British Columbia Supreme Court in *Hill v. Johnson Controls L.P.* demonstrates the potential risk of taking a strict formulaic approach to determining reasonable notice periods for employees. The Court, in *Hill*, rejected the employer's submission that the employee was entitled to 3 – 4 weeks of notice per year of service, and awarded the employee more than triple that amount.

The plaintiff in *Hill*, a 50-year-old professional engineer, was terminated by his employer after approximately four years of service. The employer argued that on these facts the case law indicated that the plaintiff was entitled to approximately 3 – 4 weeks of notice per year of service. The Court disagreed. It held that the plaintiff's sales position was highly specialized, and made use of the plaintiff's professional knowledge and training in a market with a very small number of potential clients.

The Court found that it was not going to be easy for the plaintiff to obtain another job. The Court held that the 4-year employee was entitled to 12 months' notice. An extension of the notice period, based on the manner of dismissal, was rejected by the Court. *Hill* is reminiscent of an 1993 Ontario case from the Court of Appeal, *Minnott v. O'Shanter Development*, in which the so-called "one month per year of service" rule of thumb was rejected in favour of an individualized assessment based on the employee's age, years of service, position, and availability of alternative employment.

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Upcoming Events at Rubin Thomlinson LLP:

Each of our upcoming training sessions is designed to raise awareness of relevant employment law issues and trends, and strengthen participants' skill at applying this knowledge to their own workplaces:

- Back by Popular Demand, "Help! I've Got to Fire Someone!", December 11, 2006
- "Managing the Disabled Employee", January 17, 2007

Mark the date!

February 13, 2006 is the date of our annual "Employment Law Roundup" breakfast, when Partners Janice Rubin and Christine Thomlinson will discuss the most interesting employment law cases of 2006. You'll receive your invitation by email in early January.

Please contact us at 416.847.1814 or by email at contact@rt-law.ca for additional information on any of our workshops or other events.

This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered. No part of this publication may be reproduced without prior written permission of Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.

What this means for employers:

1. Be cautious when using formulas

While charts and/or formulas for determining reasonable notice may be helpful guides in determining reasonable notice, a Court will perform a case-by-case analysis considering the employee's individual circumstances, including their:

- Age;
- Years of Service;
- Position; and
- Availability of Alternative Employment.

Generally, the older the employee, the longer he/she has been with the employer, and the more senior/specialized their position, the longer the notice period will be.

2. Beware of unique situations

Even the best formula and/or chart will not be able to factor in unique circumstances which may be applicable to a specific employee. Employers should critically examine their severance offers when dealing with:

Employees with short tenures:

Employees with short tenures tend to get a disproportionately higher notice award per years of service than other employees, particularly when it involves older employees in senior positions.

Employees in Specialized Areas:

Employees working in highly specialized positions often have a much harder time finding similar employment, and are therefore often given more notice by the Court.

Induced Employees:

Beware of employees who were recruited or induced to leave secure employment to join your company. In such circumstances, a Court may include the employee's service with the previous employer in determining their reasonable notice entitlement.

Employees Terminated in "Bad Faith":

If the employer behaves insensitively towards the employee at the termination, or otherwise behaves in a fashion that "aggravates" the termination, the employee may be entitled to additional damages.