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CALCULATING SEVERANCE - THERE'S AN APP FOR THAT

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By RBS Lawyers

Richards Buell Sutton Employment Law Newsletter

A Toronto based law firm recently released a smartphone App designed to calculate severance pay based on the employee's length of service, age and position. More specifically, the App prompts the user to select one of eight ranges for length of service, one of six ranges for age, and one of eight categories for position. The App then produces a range of notice or severance to which an employee is entitled for dismissal without cause.

Can severance be calculated using such a process? The App purports to be "anonymous and accurate", but also acknowledges that every case is different, other factors may be relevant, and the App should not be relied upon as legal advice.

In fairness, the App appears to be designed for the purposes of providing very general information to the public, while also serving as a marketing device. Although the App and similar technologies may fulfill these purposes, quantifying severance is not always a straight-forward process.

What is Severance?

When employees are dismissed without just cause, and there is no written employment agreement which deals with notice or severance pay requirements, employers are generally required to offer reasonable working notice, pay in lieu of working notice, or some combination of the two. The purpose of this requirement is to assist employees in their transition from one job to another.

Pay in lieu of working notice is often called "severance". Absent a contractual provision stating otherwise, severance is typically calculated based on the pay and benefits that an employee would have earned during a reasonable period of working notice. Therefore, a quantification of severance actually requires an assessment of the amount that an employee earned in a given period, and a calculation of the reasonable notice period.

While an assessment of an employee's pay and benefits is usually fairly straightforward, calculating a





reasonable notice period is more complex. It is this more complex calculation that the App and other similar technologies attempt to provide.

Calculating the Reasonable Notice Period:

It is often assumed that an employer can simply rely on the minimum standards prescribed by legislation, such as the B.C. *Employment Standards Act*, in determining a reasonable notice period, or pay in lieu of notice. Such an assumption is almost always wrong.

Absent legislation or an agreement to the contrary, the reasonable notice period is usually calculated in accordance with a non-exclusive set of criteria established by the courts. These most commonly include the character of employment, length of service, age, availability of alternative employment, and industry norms.

While the App takes the first three of these factors into consideration, it groups each into broad, non-specific categories. It also omits other criteria that the court may consider, such as pre-employment representations that may have been made, and the manner in which the termination was carried out.

Who is Entitled to Severance Based on the Common Law Reasonable Notice Period?

Employees will generally be entitled to severance based on a common law reasonable notice period if they are dismissed without just cause. However, there are numerous exceptions to this rule. Among others, different rules will typically apply to:

- unionized employees, whose rights upon termination will be governed by the terms of a collective agreement;
- employees who have entered into valid employment agreements, which limit severance entitlement;
- employees who have entered into fixed term employment contracts, who may only be entitled to pay in lieu of notice for the remainder of the fixed term contract;
- probationary employees, whose entitlement to severance is governed by the terms of an express employment agreement, combined with unique common law considerations; and
- certain government or other workers, whose entitlement to severance may be limited or governed by legislation.

Mitigation:

The amount of severance that an employee will receive is also subject to the employee's duty to mitigate. This duty requires dismissed employees to take all reasonable steps to find alternative employment. Employees who fail to take such reasonable steps may be susceptible to a reduction in their severance





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award if there is proof that reasonably comparable employment opportunities were available. Further, employees who do find new work during the notice period may have their severance reduced by the amount they earned during the notice period.

No Rule of Thumb for Calculating Severance:

While severance calculating technologies may be helpful, the courts have made it clear that there is no rule of thumb for calculating reasonable notice: *Capital Pontiac v. Coppola*, 2013 SKCA 80. As a result, each case should be individually assessed, taking into consideration the full range of criteria, before a conclusive legal opinion can be rendered with respect to severance entitlement.



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