

Ontario's Court of Appeal Upholds "Exceptional" Notice Periods

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As most employers know, absent a well-drafted termination provision, an employee dismissed without cause is entitled to "reasonable notice" or pay in lieu of such notice at common law, which is intended to provide the employee with a reasonable period of time to secure alternative employment. In determining the length of this common law notice period, courts will apply the oft-cited *Bardal* factors, which include the character of employment, length of service, the employee's age, and the availability of similar employment having regard to the employee's experience, training, and qualifications.

While there is no absolute upper limit or cap on the length of a reasonable notice period, courts have typically held that only the presence of "exceptional circumstances" will justify a notice period in excess of 24 months.

However, two decisions of the Court of Appeal for Ontario released on October 23, 2023, upheld notice periods greater than 24 months, and in doing so provide interesting commentary on what may constitute "exceptional circumstances" justifying increased notice periods in excess of this traditional threshold.

Milwid v IBM Canada Ltd.

*Milwid v IBM Canada Ltd. (Milwid)*¹ involved the termination of a 62-year-old employee in May 2020 who had worked for IBM for 38 years (being most of his working life), whose position was specialized and geared towards IBM's business operations, and who was entitled to a comprehensive compensation and benefits package (which included the possibility of equity compensation).

On a motion for summary judgment, the motions judge held that Mr. Milwid was entitled to a total notice period of 27 months, consisting of a 26 month "non-pandemic" notice period plus an additional month of notice due to the dismissal occurring at the outset of the COVID-19 pandemic. IBM appealed the summary judgment decision arguing that the motion judge erred in finding that there were exceptional circumstances that would justify fixing the reasonable notice period in excess of 24 months.

The Court of Appeal dismissed IBM's appeal noting that there was nothing impermissible in the motion judge's relying on the *Bardal* factors along with other exceptional circumstances to find that a notice period in excess of 24 months was warranted. The Court of Appeal went on to highlight two exceptional circumstances that supported an increased notice period in this case:

1. The employee's skills were not transferable as they related almost exclusively to IBM's products; and
2. The employee was terminated precisely when the global economy was shutting down due to the COVID-19 pandemic. The Court noted that the pandemic was represented a "truly exceptional circumstance" and there was no basis for interfering with the motion judge's decision to add an additional month to the notice period due to the COVID-19 pandemic and timing of Mr. Milwid's dismissal.

Lynch v Avaya Canada Corporation

*Lynch v Avaya Canada Corporation (Lynch)*² involved the termination of another 38-year employee, this time a professional engineer who was nearly 64 years old at the time of his termination in November 2020, which was three years prior to his intended retirement. On summary judgment, Mr. Lynch was awarded a 30-month notice period.

Avaya appealed, contending that the motion judge erred by misapplying the factors set out in *Bardal* to find exceptional circumstances in this case. The Court of Appeal was not persuaded that the motion judge made an error in fixing a 30-month notice period and dismissed Avaya's appeal.

While emphasizing that motion judges should specifically identify the factors demonstrating the presence of "exceptional circumstances" when drafting decisions awarding reasonable notice period in excess of 24 months, in this case the Court of Appeal found that it was possible to discern the "exceptional circumstances" factors relied on by the motion judge as follows:

- Lynch specialized in the design of software to control unique hardware manufactured by Avaya at its Belleville facility. Mr. Lynch's job was unique and his skills were tailored to/limited by his very specific workplace experience at Avaya;
- Lynch developed one or two patents each year for Avaya during his 38 years of employment;
- Lynch had been identified as a "key performer" in one of his last performance reviews; and
- The absence of comparable employment in Belleville where Mr. Lynch – who was approaching his 64th birthday – had lived throughout his employment.

The Court of Appeal held that these factors provided the requisite support for the motion judge's determination that Mr. Lynch's circumstances were exceptional. Accordingly, there was no basis for interfering with the motion judge's decision to award the employee a notice period in excess of 24 months.

While the Court of Appeal's reasons are brief, the references to the employee being a "key performer" and his history of patent development are notable since traditionally the quality of an employee's work and the nature of the work product are not considered relevant factors for the purpose of determining a common law notice period, let alone "exceptional circumstances" that would warrant a notice period in excess of 24

months. It remains to be seen if such factors will be deemed relevant in future cases. Certainly, such an analysis is a potentially significant departure from existing case law on determining the appropriate notice period for dismissed employees.

Lessons for Employers

These recent decisions demonstrate an increasing flexibility in what may be considered exceptional circumstances entitling an employee to a notice period in excess of 24 months on termination, and serve to highlight the importance to employers of drafting enforceable employment agreements with clear termination provisions in order to mitigate their liabilities when dismissing employees.

The Cassels Employment & Labour Group is available to provide assistance in preparing and reviewing such agreements, as well as addressing any other employment-related inquiries.

¹ *Milwid v IBM Canada Ltd.*, 2023 ONCA 702.

² *Lynch v Avaya Canada Corporation*, 2023 ONCA 696.