Cassels

Keeping a Lid on It - Ontario Court of Appeal Reinforces 24 Months as Presumptive Limit for Reasonable Notice Awards

July 23, 2019

In February of this year, we warned employers about the potential implications of the Ontario Superior Court of Justice's rather alarming decision in *Dawe v. Equitable Insurance Company of Canada*, in which the Court effectively challenged the long-standing, judicial presumption that, absent truly exceptional circumstances, common law notice of termination should not exceed 24 months (See: "Ontario Court Pushes the Envelope with 30 Month Reasonable Notice Award."). That decision was ultimately appealed by the defendant employer on a number of grounds, including that the motion judge had erred in finding that the appropriate notice period in that case was 30 months.

Fortunately, with the Ontario Court of Appeal weighing in just last month and issuing a decision that effectively restores the "cap" (albeit a soft "cap") on common law notice awards, Ontario employers can now perhaps sleep a little easier.

The Facts

As you may recall from our earlier e-Lert, Mr. Dawe was a 37-year employee of The Equitable Life Insurance Company of Canada (Equitable Life) whose employment as a Senior Vice President was terminated without cause at age 62.

The termination of Mr. Dawe's employment was, in fact, precipitated by a rather minor dispute arising out of his unauthorized purchase of hockey and basketball tickets for promotional and personal use. That dispute escalated rather quickly to a meeting involving the Senior Vice President of Human Resources and a request, by Mr. Dawe, for an exit plan and a severance package.

While Equitable Life entertained Mr. Dawe's request and initiated the negotiation of a severance package, an agreement was never reached. Believing that Mr. Dawe's continued employment had become untenable given the tenor of the negotiations, Equitable Life ultimately terminated his employment and offered him 24 months' notice as part of a severance package.

Mr. Dawe then sued, arguing that he was entitled to 30 months' notice at common law.

The Superior Court's Initial Ruling

Notwithstanding the typical 24-month ceiling to which Canadian courts have historically limited most notice

awards (despite there technically being no absolute upper limit), the motion judge who heard the case awarded Mr. Dawe his requested 30-month notice period. In arriving at this decision, he held that "presumptive standards no longer apply" and that "whether it is exceptional circumstances or recognizing a change in society's attitude regarding retirement, the particular circumstances of the employee must be considered."

The motion judge found that, while Mr. Dawe had begun the process of retirement planning, he had made no decision as to when his retirement would occur and planned to work at least until age 65. Given the lack of job prospects, the motion judge considered that, in Mr. Dawe's case, "termination without cause is tantamount to a forced retirement." In fact, notwithstanding the 30-month award, he felt that the case actually merited a minimum 36-month notice period.

The Court of Appeal's Review

In a unanimous ruling, the Court of Appeal held that the motion judge's determination that a 30-month notice period was appropriate "did not rest on the presence of exceptional circumstances; instead it was based on his perception of broader social factors that led him to conclude that the 'presumptive standards' discussed in *Lowndes* [*v. Summit Ford Sales Ltd.*] were inapplicable." The Court held that it was improper for the motion judge to have relied on his own perceptions of the "change in society's attitude regarding retirement" as there was "no basis for such sweeping statements." According to the Court of Appeal, it was not open to the motion judge to "chart his own course in light of [existing legal] authorities" none of which suggested that the end of mandatory retirement ought to alter the traditional approach to determining reasonable notice.

Moreover, to the extent that the motion judge viewed the case as "tantamount to forced retirement," the Court of Appeal pointed out that it was Mr. Dawe himself who initiated the process of his own departure from Equitable Life.

Thus, while the Court of Appeal agreed with the motion judge that Mr. Dawe's circumstances warranted a "substantial notice period," there was no basis to award Mr. Dawe more than 24 months' notice. As such, the Court reduced Mr. Dawe's award from 30 to 24 months' notice.

Takeaways for Employers

Well, employers can breathe a collective sigh of relief, safe in the knowledge that, at least for the time being, it will take truly exceptional circumstances for long-service employees to be awarded more than 24 months' notice. This case alone, however, is unlikely to dissuade employees with aggressive legal counsel from arguing that their circumstances are indeed the exception. The best defence, as always, to such employee claims remains having a practice of ensuring new employees sign valid, written agreements limiting their entitlements on termination before commencing employment.

Cassels

For further information, please contact Adrian Jakibchuk or any other member of the Employment & Labour Group.
