

Ontario Court Pushes the Envelope with 30 Month Reasonable Notice Award in Employment Cases

Stefanie Di Francesco

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Until recently, employers could be reasonably assured that Canadian courts would limit a dismissed employee's entitlements to reasonable notice at common law to a maximum of 24 months. However, cases where exceptional circumstances have been found to justify notice periods in excess of 24 months have been appearing with increased frequency – especially in Ontario.

A recent decision of the Ontario Superior Court of Justice has sent a strong message that Ontario courts continue to be willing to push the envelope in extending notice periods beyond 24 months. In *Dawe v. Equitable Life Insurance Company of Canada*, the Court awarded 30 months of reasonable notice to a dismissed employee, but “felt this case warranted a minimum 36 month notice period” had the employee requested it.

The Facts

Mr. Dawe's employment with Equitable Life was terminated by its Board of Directors on a without cause basis. At the time of the termination of his employment, Mr. Dawe held the position of Senior Vice President. He was 62 years old, had 37 years of service, and earned in excess of \$500,000 per year.

Although the Court expressly stated that the following events were not considered in its assessment of the appropriate reasonable notice period, the Court made mention of the following additional background details: Mr. Dawe was the only senior executive remaining at Equitable Life since it hired its new President and there was a suggestion in the evidence, not denied by Equitable Life, that Mr. Dawe's termination was a planned event over a period of time. Further, leading up to the termination of Mr. Dawe's employment, he and the new President had a minor disagreement concerning the purchase of tickets to a sporting event for business promotion, which escalated.

The Findings

The Court acknowledged that the starting point for determining the appropriate reasonable notice period is an assessment of: (1) the employee's age; (2) the character and nature of employment; (3) the length of service to the employer; and (4) the availability of similar employment, having regard to the experience, training, and qualifications of the employee. Having regard for these factors, the Court found that Mr. Dawe was at “the extreme high end” of each of these factors.

Cassels

The Court then acknowledged the case law, which indicates that, although there is no absolute upper limit on what constitutes reasonable notice, generally only exceptional circumstances will support a base notice period in excess of 24 months. However, the Court went on to find 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.”

While Mr. Dawe had commenced the process of retirement planning, the court found that he had made no decision as to when his retirement would occur and planned to work until he was at least 65, if not longer. The Court also found that his mitigation efforts demonstrated that there was a lack of other employment opportunities. In these circumstances, the Court concluded that “termination without cause is tantamount to a forced retirement.”

With no comparable employment opportunities, in particular, the Court felt that “this case warranted a minimum 36 month notice period” and that Mr. Dave’s requested 30 month notice period was “more than reasonable.”

Takeaways for Employers

While it remains unlikely that Ontario courts will regularly award reasonable notice for a period in excess of 24 months, employers are well advised to protect themselves from such extraordinary awards by, among other things, obtaining valid, enforceable, written employment agreements that limit an employee’s rights upon the termination of the employment relationship when they are best positioned to secure an entitlement well below the 24 month soft cap.

For further information, please contact Stefanie Di Francesco or any other member of the Employment & Labour Group.

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