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Employment & Labour

June 2019

Court of Appeal Affirms "Cap" of Twenty-Four Months absent exceptional circumstances

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On June 19, 2019, the Ontario Court of Appeal released a decision in *Dawe v. Equitable Life Insurance Company of Canada*. One of the issues in the case which will be of interest to Employers concerned the Plaintiff's entitlement to notice, and whether an award of thirty (30) months was appropriate in the circumstances.

Mr. Dawe was employed as a Senior Vice President with Equitable Life Insurance Company of Canada ("Equitable Life") and was terminated after thirty-seven (37) years of employment without cause. At the time of termination, he was sixty-two (62) years old, having commenced his employment with Equitable Life at the age of twenty-five (25). Over the years, he had received several promotions.

At the time of termination, Equitable Life offered Mr. Dawe twenty-four (24) months' notice, plus certain other benefits. He refused to sign a Release and was paid his minimum entitlements under the *Employment Standards Act*. He then brought a motion for summary judgment alleging, among other things, that the twenty-four (24) month notice was insufficient. The Motion Judge determined that the Plaintiff was entitled to thirty (30) months' notice. Despite a number of cases which had found that only exceptional circumstances would support a base notice period in excess of twenty-four (24) months, the Motion Judge took a different approach and concluded that a notice period of thirty (30) months was appropriate and did not rest on the presence of *"exceptional circumstances"*, but rather, was based on the Judge's perception of broader social factors including a change in society's attitude regarding retirement.

The Court of Appeal reversed the Motion Judge and reduced the notice period to twenty-four (24) months. First, the Court of Appeal indicated that the Motion Judge should have applied the traditional line of authority restricting Plaintiffs to twenty-four (24) months instead of relying on his own perceptions of the change in society's attitude regarding retirement. Second, the fact that mandatory retirement was abolished in Ontario in 2006 should not change the Court's views about the traditional approach to determining reasonable notice, and it was not open to the Motion Judge to *"chart his own course"* in the light of authorities which generally restricted employees to twenty-four (24) months' notice.

It is important to note that the Court specifically acknowledged that the Plaintiff's lengthy employment service and his loyalty and dedication to his Employer's business were not the type of *"exceptional circumstances"* that might drive the notice period beyond twenty-four (24) months; rather, the base notice of twenty-four (24) months recognized and rewarded these factors, and constituted the *"high-end of the appropriate range of reasonable notice for long term employees"*.

This case is significant in that there has been a trend over the last few years with long service employees seeking notice periods of thirty (30) and even thirty-six (36) months, based on working for an Employer their entire lives and being in their late 60s and even early 70s. Employers are often confronted with demands for well in excess of twenty-four (24) months when they terminate employees in these situations. While it is still possible for an employee to successfully seek a notice period in excess of twenty-four (24) months, the Equitable Life decision suggests that *"exceptional circumstances"* must be precisely that, and that lengthy service and age would not generally suffice to enlarge a *"cap"* of beyond twenty-four (24) months.

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