

An Employee's Retirement Plans Do Not Determine The Reasonable Notice Period

August 6, 2019

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On May 23, 2019, G.T. Trotter J.A., writing for a unanimous Ontario Court of Appeal, released his decision in *Dawe v The Equitable Life Insurance Company of Canada*, overturning the 2018 decision of the Ontario Superior Court. The Court of Appeal held that an employer does not have to consider an employee's retirement plans in determining reasonable notice period in the event of dismissal. The Court of Appeal also reiterated that a notice period greater than 24 months will only be warranted in exceptional circumstances.

BACKGROUND

The plaintiff, Michael Dawe, was employed as a Senior Vice President by The Equitable Life Insurance Company of Canada ("Equitable Life") for 37 years—his entire career. He was terminated without cause at the age of 62, following a dispute regarding the purchase of sporting event tickets for business promotion.

Mr. Dawe commenced a lawsuit, seeking 30 months' notice and full payment under Equitable Life's two bonus plans during that notice period. The motion judge held in favour of Mr. Dawe, granting 30 months as the appropriate notice period and entitlement to bonus payments during that period. Equitable Life appealed both findings, submitting the motion judge's determination of reasonable notice was excessive.

THE ISSUES

The issues before the Ontario Court of Appeal were whether the motion judge erred in finding that the appropriate notice period was 30 months, and whether the plaintiff was entitled to full bonus payments during the notice period.

ANALYSIS

Trotter J.A. reviewed the Ontario Court of Appeal's jurisprudence, which holds that reasonable notice is determined on a "case-specific" basis, and while there is no upper limit only exceptional circumstances will support a base notice period in excess of 24 months.

Trotter J.A. held that the motion judge took a different approach from by relying on his own perceptions of a change in society's attitude towards retirement instead of the presumptive standards in *Lowndes*. The motion judge noted many employees continue past the usual retire age of 65. He remarked that Mr. Dawe had made no decision as to his retirement and would have likely worked until at least the age of 65. Accordingly, he placed Mr. Dawe at the extreme end of the *Bardal* factors, holding that this case would warrant a minimum notice period of 36 months. In granting Mr. Dawe 30 months' notice, which was what Mr. Dawe had claimed, the motion judge ensured that he would be compensated past his 65th birthday. Effectively, the motion judge introduced an employee's decision with respect to retirement as a variable to consider alongside the *Bardal* factors in determining notice period; here, to Mr.

Dawe's benefit.

The Court of Appeal rejected the motion judge's decision, holding that there was no basis for altering the traditional approach to reasonable notice. Trotter J.A. ruled that Mr. Dawe's retirement plans were not determinative in ascertaining Equitable Life's obligations towards him. Citing *Strudwick v Applied Consumer & Clinical Evaluations Inc.*, he held that absent a fixed term contract, an employer does not guarantee employment to retirement; and, in entering an employment relationship, an employer does not take on the risk of paying an employee until their retirement in the event of dismissal.

The Court of Appeal also noted that Mr. Dawe initiated his own exit from Equitable Life, weighing against possible "exceptional circumstances" that would justify a notice period in excess of 24 months. While Trotter J.A. agreed that Mr. Dawe's circumstances warranted a substantial notice period, there was no basis to award more than 24 months' notice. The Court of Appeal reduced the notice period to 24 months.

Regarding loss of bonus entitlements, Trotter J.A. found that the terms of the bonus plan were unambiguous. He agreed with the motions judge that while the termination provision was enforceable, it had not been brought to Mr. Dawe's attention and therefore was unenforceable on this evidentiary basis. Trotter J.A. therefore held that Mr. Dawe was entitled to damages for loss of his bonus entitlement during the 24 month notice period.

LESSONS FOR EMPLOYERS

The Court of Appeal's decision in *Dawe* provides the following reminders and lessons for employers:

- The common law presumption that an employer is required to provide reasonable notice of a without-cause termination is rebuttable if the parties have agreed to some other period of notice. Employers should therefore consider written employment agreements with a termination provision when hiring employees.
- In dismissing an employee who is entitled to reasonable notice, an employer does not have to consider the employee's retirement plans in determining the reasonable notice period. Rather, the reasonable notice period will be based on the traditional factors set out in *Bardal v. Globe & Mail Ltd.*
- Reasonable notice is determined on a "case-specific" basis with no upper limit. However, only exceptional circumstances will warrant a base notice period in excess of 24 months.
- With respect to bonus plans, an employer must be able to establish that employees are aware of the terms of the bonus plan, including any provisions that affect an employee's entitlement upon termination of employment, in order for them to be enforceable.

Employers will benefit from staying informed, ensuring that their employment agreements and ancillary documents such as bonus plans are unambiguous and enforceable, and consulting legal counsel to advice on employee terminations. For more information on the topic discussed in this update, or to ensure that you are engaged with employment law matters, please contact a member of WeirFoulds' [Employment Law Group](#).

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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