

Member's Quarterly

Spring 2019 Edition

Feature

No Short Notice for Short Service Employees in Ontario

Don't rely on the "rule of thumb"

When it comes to assessing an employee's common law reasonable notice period, employers are generally quite familiar with the judicial "rule of thumb" — one month of notice per year of employment. When applied to short service employees, this rule clearly translates into shorter notice periods... right?

Not so fast!

In fact, courts in Ontario have been consistently awarding notice periods for short service employees that far outstrip the "rule of thumb." In 1999, the Ontario Court of Appeal rejected the "rule of thumb" in *Minott v O'Shanter Development Company Ltd.*, 42 OR (3d) 321 (ONCA) as being largely inapplicable to employees with very short service.

In the 2011 decision of *Love v Acuity Investment Management Inc.*, 2011 ONCA 130 (*Love*), the Court of Appeal again raised doubts about the weight that can be attributed to an employee's length of service when assessing reasonable notice. In *Love*, the Court cautioned placing a disproportionate weight on length of service, particularly where it may underemphasize the nature of the employee's work or their age.

In the years that have followed *Love*, the notice periods awarded for short service employees at common law has steadily risen.

Recent Decisions

Generally speaking, the courts have been consistently awarding notice periods in the range of four to six months for employees in middle to upper management, even where there are no aggravating circumstances.

In the past two years, the following common law notice periods were awarded to short service employees:

- In *Nemirovski v Socast Inc.*, 2017 CarswellOnt 14948, a Product Manager employed for 19 months was awarded a notice period of nine months following his termination. The Ontario Superior Court paid particular attention to the fact that the employer did not provide the employee with a reference letter, and it took him more than nine months to find alternate employment, albeit with a lesser salary. There was also a particularly onerous non-competition clause in the employment contract.
- A Sales Manager in *Nogueira v Second Cup*, 2017 CarswellOnt 16262 was awarded a notice period of four months following the termination of her employment after 8.5 months.
- In *Van Wyngaarden v Thumper Massager Inc.*, 2017 CarswellOnt 9833, a 59 year-old Electric Designer was awarded a four-month notice period after a mere six months of employment. Key to this award was the employee's unsuccessful mitigation attempts and his age.
- In *Raposo v CA Canada Company*, 2018 CarswellOnt 12044, a Senior Business Technical Architect employed for 2.7 years was awarded a five-month reasonable notice period.



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Feature continued

- A 38 year-old General Manager employed for 1.4 years in *Bergeron v Movati Athletic (Group) Inc.*, was awarded a three-month reasonable notice period. The notice period was on the lower end because of the employee's age and the fact that she became gainfully employed within one month of being terminated without cause.

The Takeaway for Employers

Employers should be cognizant of the fact that the courts continue to award notice periods that go well beyond one month per year of employment for short service employees, particularly where they are in middle to upper management and where age is a factor.

Practically speaking, when preparing termination materials for short service employees, employers seeking to avoid litigation over the applicable notice period should seek legal advice as to the appropriate notice periods or payment in lieu thereof. Employers who base the notice period on length of service for short service employees do so at their own peril. This can be particularly challenging given the disparity between minimum statutory entitlements for these employees compared to notice at common law.

Employers should also take a look at their existing employment agreements, particularly termination clauses as they pertain to notice periods. While the law in this area is also somewhat in flux, employers should seek legal advice as to appropriate language that may allow for enforceable pre-determined notice periods that are also compliant with minimum standard obligations.

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