

Member's Quarterly

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Feature

Ontario Court of Appeal Affirms "Cap" of 24 Months' Notice

Good news for employers

In recent years, employers in Ontario have watched closely as the notice period awarded by the courts continued to creep over and above the once recognized 24-month "cap". Specifically, notice periods of 30 and even 36 months have been awarded for long-service, high-earning employees nearing retirement.

Thankfully for employers, the Ontario Court of Appeal has recently weighed in to affirm that 24 months of notice remains the "high end" in *Dawe v Equitable Life Insurance Company of Canada*, 2019 ONCA 512 ("Dawe").

The Facts

Mr. Dawe had been employed for 37 years with Equitable Life Insurance Company of Canada ("Equitable Life") when he was terminated on a without cause basis. He was 62 years old, a Senior Vice President and had spent his entire career with Equitable Life. At the time of his termination, Equitable Life offered Mr. Dawe 24 months' notice in addition to some other benefits which Mr. Dawe refused.

On a motion for summary judgment, the Motion Judge determined that Mr. Dawe was entitled to a notice period of 30 months. Alarming, the Motion Judge also noted that he would have awarded Mr. Dawe upwards of 36 months' notice; however, Mr. Dawe had only claimed 30 months in his Statement of Claim.

The decision caused considerable stir among employers who otherwise drew on the 24-month cap as a strong negotiating tool when it came to long-service employees. Rarely, and but in "exceptional circumstances" had the cap been exceeded. *Dawe* signalled the continuation of a worrying trend in notice period awards.

Interestingly, the Motion Judge did not base his decision on the presence of "exceptional circumstances," but rather on his own perception of broader factors, such as society's changing views about retirement. Specifically, Mr. Dawe had testified that he intended to retire at age 65. As such, the 30 months of reasonable notice awarded to him by the Motion Judge put him in the same situation as though he had remained at work just past the age of 65.

Overtaken on Appeal

In June 2019, the Ontario Court of Appeal overturned the Motion Judge's award of 30 months reducing it to 24 months. The basis for allowing the appeal was the fact that no exceptional circumstances existed which would have warranted a notice period in excess of the 24 months. Indeed, the Court of Appeal found that 24 months remained the "high end" of reasonable notice awards.

Notably, the Court of Appeal did not agree with the Motion Judge's emphasis on Mr. Dawe's retirement plans, stating that these plans did not determine Equitable Life's obligations to him. Indeed, while the Motion Judge was correct in concluding that Mr. Dawe was entitled to a substantial notice period given his senior position, years of service, age and difficulty in finding alternate employment, the Court of Appeal stated that such factors were already recognized and adequately rewarded for with a notice period of 24 months.



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While the Court of Appeal stated that there was no "absolute upper limit" in terms of notice period, they reiterated that generally only exceptional circumstances would support a notice period greater than 24 months.

Employers Take Note

The decision in *Dawe* is significant for employers as it affirms that the 24-month "cap" remains intact. Notably, it also signals that lengthy service, high salary and age would generally not constitute "exceptional circumstances" such that a notice period beyond 24 months would be appropriate. This is key as the recent trend of awards beyond 24 months have, for the most part, been centered on such factors.

While employers should be aware of the fact that the Court of Appeal did not entirely close the door on notice periods in excess of 24 months, its decision in *Dawe* has likely strengthened the enforceability of the "cap" on notice periods overall. It will be interesting to see the impact that this decision has on the notice periods awarded by the courts going forward.

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