Ontario court rejects 24-month cap for notice period

1 month per year of service a reasonable amount even for longer-term employees, regardless of character of employment

| BY RONALD MINKEN |

THE ONTARIO Superior Court of Justice has rejected a commonly-held belief that reasonable notice has a maximum amount, finding employees with longer periods of service could get larger amounts.

In *Abrahim v. Sliwin,* a motion for default judgment was brought by 31 employees of two sportswear retailers, Avon Sportswear and Shain Sportswear, and their owners, alleging they constituted a "common employer" and thus were jointly and severally liable for wrongful dismissal damages owing to them. The causes of action for wrongful dismissal damages arose when the business carried on by one or more of the owners was discontinued, and was, perhaps, sold to someone else. The employees were given inadequate or no notice, and no termination or severance pay. Sworn affidavits were filed by the employees describing the nature of their employment, their length of service, the circumstances of their layoff or dismissal, and their attempts at mitigation, including the disclosure of any amounts they earned in mitigation.

Counsel for the employees proposed a formula of one month's pay for each year of service with a cap of 24 months, subject to mitigation. Each employee was employed in a non-managerial position, in a relatively unskilled job, at a low rate of pay. The court concluded one month's pay per year of service was an untenable formula at law, citing the Ontario Court of Appeal decision in *Minott v. O'Shanter Development Co.* Additionally, the court rejected the employees' argument that the Court of Appeal in *Cronk v. Canadian General Insurance Co.* "had established an upper limit of 12 months for non-managerial employees." With respect to the 24-month cap proposed by the employees, the court held that "any such approach has now been rejected by the Court of Appeal in *Di Tomaso v. Crown Metal Packaging Canada LP*."

REASONABLE NOTICE

Justice MacPherson for the Court of Appeal disagreed, stating that the character of the employment "is today a factor of declining relative importance" and "in practical terms, character of employment is now largely irrelevant except for a small class of very senior employees."

The court concluded "if a cap of 12 months is not appropriate, I fail to see how a cap of 24 months, or indeed any maximum, is appropriate. Two of the plaintiffs had worked for one or more of the defendants for at least 35 years, and were 63 years of age or older. I might have decided to award more than 24 months' pay had such a request been made."

Impact on employers

Employers should ensure proper notice is provided to employees in the event of a business discontinuance or sale. Strategic advance planning is necessary to reduce monetary payouts and minimize the risk of litigation. An effective tool is employment agreements. However, great care is required in their drafting and implementation. With proper drafting and implementation a company can increase the value of their business and net greater profit on a sale as a result of the purchasing company, not inheriting employees with large notice entitlements. The above is tricky and if not done properly can result in loss of employee morale, litigation costs and substantial payouts to employees.

Impact of decision on employees

Employees may find they have more than one employer to pursue in the event of a sale of closure of the business they work for. This is referred to as a "common employer," where two or more companies can be found to be "jointly and severally liable" for wrongful dismissal damages. Further, a signed employment agreement may not pass judicial scrutiny and an employee may be entitled to substantial common law notice, perhaps from the purchasing company and or its predecessor. As there is no cap on notice, even non-managerial, unskilled workers at a low rate of pay may be entitled to substantial notice — in exceptional cases more than 24 months.

For more information see:

- *Abrahim v. Sliwin*, 2012 CarswellOnt 13870 (Ont. S.C.J.).
- *Minott v. O'Shanter Development Co.*, 1999 CarswellOnt 1 (Ont. C.A.).
- *Cronk v. Canadian General Insurance Co.*, 1995 CarswellOnt 1200 (Ont. C.A.).
- *Di Tomaso v. Crown Metal Packaging Canada LP*, 2011 CarswellOnt 5356 (Ont. C.A.).

ABOUT THE AUTHOR

Ronald S. Minken

Ronald S. Minken is a senior lawyer and mediator at Minken Employment Lawyers, an employment law boutique in Markham, Ont.
He can be contacted by visiting www.MinkenEmploymentLawyers.ca.
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