

Court Confirms Advanced Age And Short Service Does Not Automatically Equate To Lengthy Notice Period



A recent pair of Ontario Superior Court decisions offered interesting insight on the determination of reasonable notice when faced with widely considered “outlier” factors. The two decisions, [Flack v. Whiteoak Ford Lincoln Sales Limited](#) (“Flack”) and [Ewach v. Whiteoak Ford Lincoln Sales Limited](#) (“Ewach”), were presented back-to-back to Justice S.F. Dunphy and involved the same employer and employees in similar circumstances.

Facts:

These matters involved a pair of 61-year old plaintiff employees who had been employed by the defendant employer without an enforceable written employment agreement, for nine (9) months (Flack) and nineteen (19) months (Ewach), respectively. Both individuals were employed by the defendant in sales positions and their compensation was entirely commission based. However, Flack worked in a more senior role, and earned significantly higher income than Ewach – albeit in a short stint with the defendant. The plaintiffs were terminated in or around January 2020 (Flack) and December 2019 (Ewach), respectively – importantly, several months before the onset of the COVID-19 pandemic.

Analysis:

As the Employer’s Edge blog has explained on several occasions, without an enforceable employment agreement the reasonable notice period is determined on a case-by-case basis, using a well-recognized set of factors stemming from the seminal decision in [Bardal v Globe and Mail Ltd.](#) (known as the “Bardal Factors”). The Bardal Factors include the employee’s: (1) age at the time of termination, (2) length of employment, (3) character or nature of employment, and (4) the availability of similar employment.

In applying the Bardal Factors, Justice Dunphy offered a refreshing perspective on the relevance and weight of each factor in the specific circumstances. For instance, Justice Dunphy stated the following:

- **Short service does not always attract lengthier notice periods:** *“Absent other factors that would tend to push towards a lengthier notice period, a short*

period of service does tend to push the needle towards a lower rather than higher notice period." In this regard, Justice Dunphy indicated that factors such as inducement or if either plaintiff was a high-level executive, may serve to lengthen the notice period.

- **Older employees are not always entitled to greater notice periods than younger employees:** Justice Dunphy indicated that while age is certainly a factor, *"the impact of that factor is one that must be assessed in combination with all other relevant factors and in the particular circumstances of the individual in question. Age may be a desirable attribute for some positions and an impediment for others."*
- **The impact of the Pandemic does not have any bearing on terminations that occurred before February to March 2020:** Justice Dunphy shared a similar sentiment in both decisions indicating, *"COVID was doubtless a hardship to Mr. Flack and the defendant both. I cannot allow sympathy for the plight of one party or another sway my impartial assessment of the facts. COVID was clearly a subsequent event in this case and ought not to impact the determination of the period of reasonable notice [emphasis added]."*
- **Reasonable mitigation requires more than a minimal effort:** While mitigation did not play a significant role in either matter, Justice Dunphy in Ewach did confirm that while the burden of establishing unreasonable mitigation lies with the defendant, *"A single barely legible record of job search efforts without more hardly provides comfort that the plaintiff in question was being sufficiently proactive and diligent."*

Decision:

Ultimately, the court determined that the plaintiffs were entitled to reasonable notice periods of **two (2) months** (Flack) and **2.5 months** (Ewach), respectively. Both awards were well below the notice periods claimed by the plaintiffs, i.e. eight (8) months (Flack) and ten (10) months (Ewach), and better aligned with ranges submitted by the defendant.

Key Takeaways:

These decisions represent a major win for employers in Ontario. There is a commonly held belief that terminating a short-service, advanced-aged employee without an enforceable termination clause is akin to setting oneself on fire, when taking into consideration the perceived risk associated with combination of these outlier factors. However, the court once again confirmed that the determination of the reasonable notice period is not an exact science, and each case must be considered on their own merits with reference to the Bardal Factors. For both Flack and Ewach, neither employee was particularly disadvantaged by their age or length of service, and were given several months to secure alternate employment before the Pandemic stymied the job market. As such, the court opted to look past these seemingly glaring factors and offered a decision that was reasonable in the circumstances.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.