

Ontario, Canada Court Of Appeal Upholds 26-Month Reasonable Notice Period Due To Exceptional Circumstances



In [*Currie v. Nylene Canada Inc.*, 2022 ONCA 209](#), the Ontario Court of Appeal (OCA) dismissed the employer's appeal of a [lower court decision](#) in which the trial judge held "exceptional circumstances" existed to justify making an award that exceeded the 24-month "high end" amount of reasonable notice for long-term employees and awarded 26 months' salary in lieu of notice. The Ontario Superior Court had held that "combining all of the factors set out in *Bardal*" (*i.e.*, character of the employment, the length of service, the employee's age, and the availability of similar employment), the employee demonstrated the existence of exceptional circumstances.

The employer appealed the trial judge's damage award on two grounds:

- The trial judge erred when he used the period from 1979 until 2018 to determine the employee's period of reasonable notice. He should have used June 2017, when she retired and was then rehired, until December 2018. Her retirement in 2017 constituted a break in service of her employment such that her immediate re-hiring "re-set her years of service clock back to zero"; and
- The trial judge erred in law by exceeding a maximum reasonable notice period of 24 months as there was no basis in this case to justify a longer notice period.

Decision

Both grounds of appeal failed.

Years of Service for Purpose of Determining Period of Reasonable Notice

With regard to the first ground of appeal, the OCA accepted the trial judge's conclusion that the retirement/re-hiring proposed by the employer, to which the employee agreed, was for "the limited purpose" of enabling the employee to access her pension plan and did not affect her years of service with the employer for the purpose of determining the reasonable notice period.

Period of Reasonable Notice

With regard to the second ground of appeal, the OCA accepted the trial judge's conclusion that 26 months' reasonable notice was warranted based on the following factors:

- The employee left high school to start work (at age 18) at the employer and worked there for her entire career;
- After working for 40 years, the employee's employment was terminated near the end of her career, when she was 58 years old;
- The employee had very specialized skills making it very difficult for her to find alternative suitable employment. Furthermore, at the time of her termination, her computer skills were limited. Although she made diligent efforts to gain basic computer skills and mitigate her damages, the trial judge was not convinced the employee would secure alternative employment;
- The work landscape had evolved significantly since the employee had entered the workforce in 1979 and because her experience was limited to working for the employer in one environment, her skills were not easily transferable; and
- Given the employee's age, limited education and skill set, her termination "was equivalent to a forced retirement."

Bottom Line for Employers

The OCA's decision in *Nylene Canada* was rendered despite the court's 2019 decision in [Dawe, 2019 ONCA 512](#), [discussed here](#). In reducing a 30-month reasonable notice award to 24 months, the OCA in *Dawe* followed judicial precedent that held that although senior position, long-term/career-long years of service of a dedicated and loyal employee at the same company, advanced age at the time of termination, and difficulty finding new employment warranted a substantial notice period, such factors are already "recognized" and "rewarded" by the 24-month notice period, and they do not establish "exceptional circumstances." In light of the *Dawe* decision, *Nylene Canada* is not completely fatal for employers but the state of the law has been rendered uncertain.

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.

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