You Can Go Your Own Way: Notice Periods And The Aging Workforce In Ontario

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Lindsey Buckingham joined Fleetwood Mac in 1974. On April 9, 2018, Fleetwood Mac, citing no cause, confirmed the rumours that Mr. Buckingham would not be joining the band on its 50+ date North American farewell tour. Mr. Buckingham considered himself fired and has sued the band for $12 million, the amount he claims he would have earned on this tour. The question arises as to what Mr. Buckingham, a 68-year old lead guitarist and singer with some 44 years of on again, off again service with the band and only very dim prospects of a comparably successful solo career, might receive as notice had Fleetwood Mac been an Ontario-based band and he an employee of that band? The answer, a potential landslide.

In 2018, Michael Dawe, 62-year old Senior Vice President with 37 years' service at The Equitable Life Insurance Company of Canada asked the Ontario Superior Court of Justice to award him 30-months' notice.[1] The court accepted Mr. Dawe's position that he had intended to work until retirement at age 65 and that there were no comparable employment opportunities for him. The court considered the particular circumstances of an older employee in a post-mandatory retirement world as factors that should be considered in assessing the notice period. The court awarded Mr. Dawe's requested 30-month notice period. In fact, on its own, the court went further. It found that Mr. Dawe should have been allowed to retire "on his own terms" and with no comparable employment opportunities "felt that this case warranted *a minimum of a 36 month notice period.*"

The case raises some interesting questions for employers in managing an aging workforce. Is there now a right to retire on your own terms? This seems unlikely, but the court leaves the door open to such a question. Will age and the prospect of re-employment have a greater impact on notice periods as our workforce ages? The highlighted quote above seems to confirm this.

Also, whatever happened to the 24-month notice cap? In 2006, the Ontario Court of Appeal wrote:

Although it is true that a reasonable notice of employment termination must be determined on a case-specific basis and there is no absolute limit or 'cap' on what

constitutes reasonable notice, generally only exceptional circumstances will support a base notice period in excess of 24 months.[2]

Unfortunately, the Court of Appeal did not elaborate on what might be an exceptional circumstance. Certainly, it is hard to see anything exceptional about Mr. Dawe's circumstances that would not have been on the Court of Appeals radar in 2006. Yes, he had long service time, but that alone is not exceptional and being 62 and planning to retire at age 65 must be a fairly typical state of affairs. This is not the first case in recent years to break through the Court of Appeal's notice cap and it may not be the last.

Like Mr. Dawe, Mr. Buckingham may have had retirement plans. After all, yesterday's gone. Should he have been permitted one last farewell tour and the chance to retire on his own terms? Had Mr. Buckingham's rights been governed by Ontario law, he might look for damages beyond just one farewell tour. There is always another farewell tour. Of course, Mr. Buckingham, in his own time, replaced Bob Welch who, in his time, replaced the incomparable Peter Green. Perhaps Mr. Buckingham should take his own advice: don't you look back.

[1] *Michael Dawe v. The Equitable Life Insurance Company of Canada* 2018 ONSC 3130.

[2] *Lowndes v. Summit Ford Sales Ltd.*, [2006] O.J. No. 13 (Ont. C.A.)

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