But we've only just met — no short notice for short service in Ontario

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Most employers in Ontario are familiar with the "rule of thumb" when it comes to calculating notice periods for employees at common law — one month of notice per year of service. While this appears to translate into shorter notice periods for short service employees, Ontario employers do so at their own peril.

In the 1999 decision of *Minott v O'Shanter Development Company Ltd.,*42 OR (3d) 321 (ONCA), the Ontario Court of Appeal rejected the "rule of thumb" as being largely inapplicable to employees with very short service. This was reiterated in 2011, in *Love v Acuity Investment Management Inc.,*2011 ONCA 130 *(Love),*where the Court of Appeal again cautioned placing a disproportionate weight on length of service, particularly where it may underemphasize the nature of the employee's work or their age.

In the years following *Love,* the notice periods awarded for short service employees at common law has steadily risen. Today, the trend in Ontario is notice periods that far outstrip the rule of thumb when it comes to short service employees.

A Recent Snapshot

Ontario courts have been consistently awarding notice periods in the range of four to six months for employees in middle to upper management with under two years of service, even where there are no aggravating circumstances:

- In *Nemirovski v Socast Inc.,*2017 CarswellOnt 14948, a product manager employed for 19 months was awarded a notice period of nine months following his termination. The Ontario Superior Court paid particular attention to the fact that the employer did not provide the employee with a reference letter, and it took him more than nine months to find alternate employment, albeit with a lesser salary. There was also a particularly onerous non-competition clause in the employment contract.
- A sales manager in *Nogueira v Second Cup,* 2017 CarswellOnt 16262 was awarded a notice period of four months following the termination of her employment after 8.5 months.
- In*Van Wyngaarden v Thumper Massager Inc.,* 2017 CarswellOnt 9833, a 59 year-old electric designer was awarded a four-month notice period after a mere

six months of employment. Key to this award was the employee's unsuccessful mitigation attempts and his age.

- In *Raposo v CA Canada Company,* 2018 CarswellOnt 12044, a senior business technical architect employed for 2.7 years was awarded a five-month reasonable notice period.
- A 38 year-old general manager employed for 1.4 years in *Bergeron v Movati Athletic (Group) Inc.,*2018 ONSC 885 was awarded a three-month reasonable notice period. The notice period was on the lower end because the employee was only 39 years of age and became gainfully employed within one month of being terminated without cause.

Key Takeaways for Employers

Employers should be cognizant of the fact that the courts continue to award notice periods that go well beyond one month per year of employment for short service employees, particularly where they are in middle to upper management, are older and where they are unable to secure alternate employment.

Practically speaking, when preparing termination materials for short service employees, employers seeking to avoid litigation over the applicable notice period should seek legal advice as to the appropriate notice periods or payment in lieu thereof. Employers who base the notice period on length of service for short service employees do so at their own peril. This can be particularly challenging given the disparity between minimum statutory entitlements for these employees compared to notice at common law.

Employers should also take a look at their existing employment agreements, particularly termination clauses as they pertain to notice periods. While the law in this area seems to be forever in flux, employers should seek up-to-date legal advice as to appropriate language that may allow for enforceable pre-determined notice periods that are also compliant with minimum standard obligations.

By

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