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COURT OF APPEAL REDUCES TERMINATION NOTICE

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A. INTRODUCTION

On June 19, 2019, the Court of Appeal for Ontario (the "Court") released its decision in *Dawe v The Equitable Life Insurance Company of Canada* ("*Dawe"*),[1] partially overturning the lower court's decision that held that 30 months was an appropriate notice period for termination without cause for an employee with 37 years of service.[2] In this case, the Court reiterated that reasonable common law termination notice periods for long serving employees should not exceed 24 months, in the absence of "exceptional circumstances." The Court further held that the employer must honour the contracted-for bonus entitlements of the employee during the notice period, unless any subsequent changes in the terms of the employment contract have been brought to the attention of the employee. This *Bulletin* provides a review of the principles outlined by the Court in *Dawe*, which are relevant to charities and not-for-profits ("NFPs").

B. BACKGROUND

This case arose from the appeal of a partial summary judgment of a wrongful dismissal lawsuit. The respondent, Michael Dawe ("Dawe") was employed with the appellant, The Equitable Life Insurance Company of Canada ("Equitable Life") for 37 years, before being terminated without cause at the age of 62. Dawe started his career at the age of 25 in insurance sales at Allstate Life Insurance Company of Canada, which was later acquired by Equitable Life. Dawe continued at Equitable Life as the Assistant

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[1] *Dawe v The Equitable Life Insurance Company of Canada*, 2019 ONCA 512 [*Dawe*].
[2] For the lower court's partial summary judgment, see *Dawe v Equitable Life Insurance Company*, 2018 ONSC 3130.

Vice President of Sales & Marketing, and after several promotions over the years, Dawe was serving as the Senior Vice President of Equitable Life when he was terminated.

A dispute arose over Dawe's purchase of sporting event tickets without proper authorization, for which he was verbally reprimanded. Dawe subsequently requested an exit strategy, but after negotiations over a severance package broke down, Equitable Life dismissed Dawe without cause. He was offered a notice period of 24 months, and based on the bonus plans in effect at the time of his termination, namely, the Long Term Incentive Plan and the Short Term Incentive Plan (collectively, the "New Plans"), he was also offered limited bonus entitlements on his termination without cause ("Terminal Awards") under the "Termination Provision," which reads as follows:

> Termination without Cause: An Eligible Participant terminated without cause will be entitled to receive only Terminal Awards calculated in sub-paragraph (a)(iv) (below), pro-rated to the last day of active employment, regardless of whether notice of termination is given or not given and regardless of whether the termination is lawful or unlawful, and only if the Eligible Participant provides the Corporation with a Full and Final Release in the manner required in the Eligible Participant's termination letter.[3]

However, to receive the Terminal Award, an employee was required to sign a release, which Dawe refused to sign on the disputed ground that he had no recollection of ever receiving the plans. As a result, while the Terminal Awards payment was withheld, Dawe was nonetheless paid 26 weeks of severance pay, in addition to 8 weeks of termination pay in lieu of notice, in accordance with minimum standards prescribed by the *Employment Standards Act, 2000* ("*ESA*").[4] Dawe sued Equitable Life for wrongful dismissal, also claiming punitive and moral damages.

While the delivery of the New Plans was disputed in this case, the fact that the introduction of the Termination Provision in the New Plans was not specifically brought to Dawe's attention remained undisputed. The Court also noted the history of prior changes over the years to Dawe's and other employees' bonus entitlements as part of their compensation packages. Equitable Life unilaterally implemented these changes, without negotiations with employees, and when advised of any changes, the employees could either continue to work under them, or leave employment.

[3] *Dawe*, *supra* note 1 at para 56 [emphasis added by court].
[4] *Employment Standards Act, 2000*, SO 2000, c 41 [*ESA*].

The lower court held, on partial summary judgment, that on termination, Dawe was entitled to a reasonable notice period of 30 months, by taking "the particular circumstances of the former employee" into consideration. This included not only the fact that Dawe had no plans for retirement and intended to work at least to the age of 65, but also took society's changing attitude towards retirement into consideration. The motion judge further held that the Termination Provision was unenforceable and did not displace the common law right to payment for three reasons: 1) the Termination Provision in the New Plans was ambiguous; 2) its terms were not brought to Dawe's attention; and 3) the requirement to sign the release was a contravention of the *ESA.* As such, the motion judge awarded damages to Dawe for the loss of his entitlement to bonus payments over the 30 month period.

The main issues on appeal before the Court were three-fold: whether the motion judge erred in 1) considering irrelevant facts applicable to the partial summary judgment; 2) finding an excessive notice period of 30 months; and 3) not finding Dawe's bonus entitlement to be limited by the Termination Provision.

C. ANALYSIS

The Court found that the motion judge erred in holding the reasonable notice period to be 30 months. Rather, it found that there were no exceptional circumstances to justify the 30-month notice period, and instead reduced it to 24 months, which is recognized as "the maximum notice period in most cases."[5] With regard to damages for loss of bonus entitlement, the Court dismissed the appeal, agreeing that the Termination Provision was unenforceable, but only on the evidentiary basis that it had not been brought to Dawe's attention. Despite the motion judge's comments on facts irrelevant to issues before it, some of which involved being critical of Equitable Life for Dawe's dismissal, or the management's conduct in the matter, the Court was not convinced that "they had any influence on the motion judge's findings on the substantive issues before him."[6]

On the issue of notice, the Court found that the motion judge had erred by not relying on the litany of cases, which serve as authority on wrongful dismissal, including the leading case of *Lowndes v Summit Ford Sales Ltd* ("*Lowndes*").[7] Despite acknowledging *Lowndes*, the motion judge failed to find

[5] *Supra* note 2 at para 30.
[6] *Dawe*, *supra* note 1 at para 28.
[7] *Lowndes v Summit Ford Sales Ltd* (2006), 206 OAC 55 (CA) [*Lowndes*].

exceptional circumstances in moving away from the 24-month cap on the notice period, and instead relied upon "his own perceptions of the 'change in society's attitude regarding retirement'."[8] In *Lowndes*, the court found "that the determination of what constitutes reasonable notice is 'case-specific' and, while there is 'no absolute upper limit or 'cap' on what constitutes reasonable notice, generally only exceptional circumstances will support a base notice period in excess of 24 months'."[9]

More recent decisions of the Court had not altered the 24-month notice period or the approach in *Lowndes*, and the Court found that those decisions did not suggest that "the end of mandatory retirement in Ontario ought to alter the traditional approach to determining reasonable notice."[10] As such, the Court held that "[i]t was not open to the motion judge to chart his own course in light of these authorities."[11] The motion judge gave regard to the abolishment of mandatory retirement in Ontario in 2006, but the Court reasoned that "this legislative initiative would have been known at the time of the *Lowndes* appeal, which was decided after Bill 211 was enacted, but before most of its provisions came into force."[12]

On this issue, the Court also found that the motion judge should not have taken into consideration Dawe's plans to retire at a certain age in determining reasonable notice. The Court found that while Dawe's age, length of service, seniority of his position, and the difficulty in finding any new employment warranted a lengthy notice period, those factors did not justify a notice period of more than 24 months.[13] Thus, the Court reduced the notice period from 30 to 24 months.

On the issue of damages for Dawe's bonus entitlement, the Court affirmed the motion judge's decision that the Termination Provision was unenforceable, but disagreed with part of the motion judge's findings. Contrary to the motion judge's finding, the Court found that the terms of the New Plans were unambiguous; however, the Termination Provision was still unenforceable because it had not been brought to Dawe's attention. The Court relied on *Paquette v TeraGo Networks Inc* ("*Paquette*"),[14] which outlines a two-part test for determining the entitlement to damages in this regard, as follows: "(1) was the bonus an integral part of the employee's compensation package, triggering a common law entitlement to

[8] *Dawe*, *supra* note 1 at para 36.
[9] *Ibid* at para 31, citing *Lowndes*, *supra* note 7 at para 11.
[10] *Ibid* at para 38.
[11] *Ibid* at para 38.
[12] *Ibid* at para 37.
[13] *Ibid* at para 42.
[14] *Paquette v TeraGo Networks Inc*, 2016 ONCA 618, 352 OAC 1 [*Paquette*].

damages in lieu of bonus?; and (2) if so, is there any language in the bonus plan that would specifically remove the employee's common law entitlement?"[15]

The Court affirmed the motion judge's finding on the first part of the test that the bonus was an integral part of the employee's compensation package, which comprised of both a base salary and additional bonus. However, on the second part of the test, it stated that "[t]he question is not whether the contract or plan is ambiguous, but whether the wording of the plan unambiguously alters or removes the appellant's common law rights."[16] The Court found that "the motion judge failed to read the plan documents as a whole, and instead applied a piecemeal approach by considering each relevant provision sequentially without regard to their combined effect."[17] Instead, it was "necessary to take a closer look at the terms of the plans individually and in combination."[18] In this regard, the Court concluded that the language of the New Plans "unequivocally restricted his common law rights upon termination" by "'anticipat[ing] the very event that occurred' – Mr. Dawe's dismissal without cause."[19]

Lastly, the Court gave deference to the motion judge on his factual findings that the changes implemented by the terms of the Termination Provision, which were unilaterally imposed by Equitable Life, were not properly communicated to Dawe and, as such, were not properly accepted. Thus, Dawe was entitled to compensation for loss of bonus entitlements, but only for the 24-month notice period, as opposed to 30 months.

With regard to the contravention of the Termination Provision with the *ESA*, given the finding on lack of proper communication of the Termination Provision to dispose of the appeal, the Court found it unnecessary to provide a complete analysis, but cautioned that it "should not be taken as an endorsement of the motion judge's conclusions regarding whether the release requirement contravened the *ESA*."[20]

[15] *Dawe*, *supra* note 1 at para 48.
[16] *Ibid* at para 62, citing *Paquette*, *supra* note 14 at para 31.
[17] *Ibid* at para 51.
[18] *Ibid* at para 52.
[19] *Ibid* at para 65.
[20] *Ibid* at para 79.

D. CONCLUSION

This case is important for employers, including charities and NFPs, in that employees with exceptionally long service are likely not entitled to termination notice in excess of 24 months, absent "exceptional circumstances." The Court did not provide specific examples of what would constitute exceptional circumstances, so this issue remains to be resolved in future cases. Employers concerned with the costs of lengthy reasonable notice periods at common law also need to consider written employment contracts as a means of limiting potential liability to terminated employees, including not only termination pay but compensation under any bonus plan.

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