ONE-MONTH-PER-YEAR FORMULA APPLIED, AND NO CAP ON TERMINATION NOTICE PERIODS: ONTARIO COURT

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A judge rejects the one-month-per-year rule of thumb for calculating termination notice periods, but then applies it. The employee's lawyer is prepared to concede that notice periods should be capped at 24 months, but the court rejects that. What are employers to expect anymore?

In *Abrahim et al. v. Sliwin et al.*,[1] a group of 34 employees brought a motion for judgment against their former employer claiming damages for wrongful dismissal. At the time of their dismissal, the employees were working in unskilled jobs. They held no supervisory responsibilities and were paid a relatively low wage. In light of these shared characteristics, the employees' lawyer proposed that the Court adopt a uniform formula of one month per year in assessing the employees' termination notice period and therefore damages for wrongful dismissal, to a maximum of 24 months.

In rejecting as a "rule"— but then applying in the case at hand — the employees' proposed approach to calculating reasonable notice, the Court made two important rulings.

First, the Court confirmed that the "rule of thumb" that an employee is entitled to one month's termination notice for every year worked has no place in assessing an employee's common law reasonable notice period. Citing the Ontario Court of Appeal's decision in *Minott v. O'Shanter Development Co.*,[2] the Court noted that the rule of thumb approach falters because it places too much of an emphasis on an employee's length of service, as opposed to other factors such as the employee's position and age. Moreover, it removes any flexibility that an employer has in fashioning an employee's notice period.

Surprisingly, however, the Court stated:

> While I disagree with Mr. Wright that the [one-month-per-year] formula he proposes is a tenable one at law, I am nevertheless persuaded that the damages proposed for each plaintiff are reasonable, and I am prepared to award them.

This means that despite its rejection of the rule of thumb approach, the Court ultimately applied that formula in the case at hand, holding that it was reasonable in the circumstances of the particular case.

Second, and perhaps most importantly, the Court ruled that a cap of 24 months on reasonable notice awards is not appropriate. Interestingly, in so doing, the Court questioned whether *any* maximum is appropriate.

While the Court's stated rejection of the rule of thumb approach for calculating reasonable notice is good news for employers, the Court's decision to apply that formula is troubling. Also, with the 24-month maximum rejected, employers need to be concerned about how high the court may go in calculating the reasonable notice period for those employees who are of an advanced age with lengthy service records. For example, in another case a 65-year-old employee with 36 years of service was awarded 26 months' notice.[3] Given this uncertainty, employers should consider implementing employment contracts with effective termination provisions at the beginning of the employment relationship. By doing so, the employer and employee can mutually agree on their own rules regarding the employment relationship, including the length of any notice period.

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Notes:

[1] 2012 ONSC 6295.

[2] 1999 CarswellOnt 1 (C.A.).

[3] *Hussain v. Suzuki Canada Ltd.*, 2011 CarswellOnt 12251.