Case In Point

Court of Appeal Reduces 24.5 Months' Notice Granted to 70 Year Old Employee

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In 2013, the decision of *Kotecha v. Affinia* garnered some attention among employment lawyers and human resources professionals. The motion judge's award of 24.5 months' notice (22 months' notice, in addition to the 11 weeks of working notice already provided) to a 70 year old employee was seen by some as a potential indicator marking a trend of higher notice periods for older workers at or past the age of 65.

At the time of termination, the employee was a machine operator making $18.23 an hour. He was 70 years old and had 20 years of service. Counsel for the Plaintiff brought a successful motion for summary judgment seeking a notice period of 22 months. Evidence was provided that the Plaintiff had applied for over 200 jobs and failed to achieve even a single interview. The motion judge applied the traditional four factors from *Bardal v. Globe and Mail Ltd*. to determine an appropriate notice period: length of service, age, character of employment and availability of alternative employment. He indicated that older employees will have a much more difficult time securing alternate employment. The motion judge also rejected a traditional principle that an individual holding a lower level, less skilled position should be entitled to a lower notice period, and commented that the position held by the employee was of declining importance in today's modern world.

Not surprisingly, Affinia appealed the notice period. Before the Court of Appeal for Ontario, Affinia made an argument that the motion court judge was "bound" by a previous decision involving the same employer and another employee on the basis that the facts were similar. The facts were actually not similar, as the employee in the previous decision was younger and had shorter service. The Court expressly rejected Affinia's argument. Nonetheless, in reviewing the motion judge's decision, the Court stated that courts should strive to "ensure that notice periods, which are inherently individual, are consistent with the case law." In this case, while the Court of Appeal recognized that the employee had "no realistic possibility of obtaining similar employment," the notice period of 24.5 months was found to be excessive and it held that there were no exceptional circumstances to justify the award. The Court concluded that 18 months was reasonable in all of the circumstances, and that the 11 weeks' working notice must be deducted from that period.

While this case is good news for employers, it also demonstrates the risk and unpredictability in estimating what a judge might find to be a reasonable notice period. As a result, employers should consider having a well-crafted termination clause in their employment contracts, which will mitigate

against this uncertainty.

Kotecha v. Affinia ULC, 2014 ONCA 411 (CanLII)