Recent Developments in Canadian Dismissal Law

Andrea York
Partner
416-863-5263
andrea.york@blakes.com

Alysha Sharma
Associate
416-863-2451
alysha.sharma@blakes.com

Jennifer Shamie
Associate
416-863-2449
jennifer.shamie@blakes.com

Blakes

Table of Contents

A. TERMINATION FOR CAUSE 1

(i) *York University v. Markicevic,* 2018 ONCA 893 2

(ii) *Manak v. Workers' Compensation Board of British Columbia,* 2018 BCSC 182 3

(iii) *Ruston v. Keddco MFG. (2011) Ltd.,* 2019 ONCA 125 5

(iv) *Klonteig v. West Kelowna (District)*, 2018 BCSC 124 6

(v) *Belyea v. Syncrude Canada Ltd.*, 2018 ABQB 132 7

B. ENFORCEABILITY OF TERMINATION PROVISIONS 8

(i) *Amberber v. IBM Canada Ltd.,* 2018 ONCA 571 9

(ii) *Bailey v. Service Corporation International (Canada) ULC,* 2018 BCSC 235 11

(iii) *Cottrill v. Utopia Day Spas and Salons Ltd.,* 2018 BCCA 383 12

C. NOTICE PERIODS AND LONG-SERVICE EMPLOYEES 13

(i) *Dawe v. Equitable Life Insurance,* 2018 ONSC 3130 14

(ii) *Saikaly v. Akman Construction Ltd.,* 2019 ONSC 799 15

D. UPDATES ON RECENT APPEALS 16

(i) *Wood v. CTS of Canada Co.,* 2018 ONCA 758 16

(ii) *Ocean Nutrition Canada Ltd. v. Matthews, 2*018 NSCA 44 19

(leave to appeal to SCC requested) 19

Blakes

RECENT DEVELOPMENTS IN CANADIAN DISMISSAL LAW

Each year, we review and summarize recent, notable case law developments related to the termination of employment in Canada over the last year or so. This paper focuses on cases in the following areas:

A. termination for cause;

B. enforceability of termination provisions;

C. notice periods and long-service employees; and

D. updates on recent and ongoing appeals.

A. TERMINATION FOR CAUSE

Termination for cause is an appropriate response by an employer if an employee has engaged in serious acts of wrongdoing. Where an employee has engaged in misconduct that amounts to cause, the employer may terminate the employee's employment without providing notice of termination or any payments in lieu of notice.

The employer bears the evidentiary burden to prove, on the balance of probabilities, that it had just cause to dismiss an employee. Determining whether or not there is cause to terminate requires a contextual approach, including an examination of the category of misconduct, the circumstances surrounding the misconduct, the nature of the particular contract of employment, and the status of the employee. As part of this analysis, the suitability of alternative disciplinary measures should also be considered by the employer.

In practice, cause is very difficult to establish. Given the current state of the law, it is also quite difficult to predict when a court will find that certain misconduct is egregious enough to warrant a just cause dismissal.

The following five cases involve employees who were dismissed for cause, and a determination as to whether the employer proved that there was indeed cause for termination. The misconduct alleged in the cases include, among other things: (a) misappropriation of funds; (b) unlawful disclosure of confidential information; (c) fraud; (d) impaired driving while off duty; and (e) violence against a co-worker.

(i) *York University v. Markicevic,* 2018 ONCA 893[1]

The appellant, Mr. Markicevic, was employed as the Assistant Vice President of Campus Services and Building Operations at York University ("York" or the "University"). During his employment, Markicevic (along with other co-conspirators) misappropriated almost one million dollars from the University. In particular, between 2007 and 2009, Markicevic devised a scheme to falsely invoice York for work that was not actually done at the University. In total, Markicevic (along with his co-conspirators) pocketed the $374,983.50 paid by the University as a result of these fraudulent invoices. In addition, in 2009, Markicevic inflated a quote for drain repair and the excess was used for his personal home improvements. The University lost $515,461 as a result of this scheme. Markicevic also had York employees perform work at his personal residences in 2008 and 2009, and the University paid these employees $23,000 for their work. Finally, Markicevic charged York for $61,241 worth of materials that he purchased for his own use.

Before York became aware of the extent of Markicevic's misconduct, on February 1, 2010, it terminated Markicevic's employment without cause. York agreed to pay Markicevic 36 months' gross salary in lieu of notice and the parties signed mutual releases. At the time of his termination, there were rumours circulating about Markicevic's financial impropriety and bullying behaviour, but Markicevic vehemently denied the rumours. He described the allegations as unfounded, libelous and slanderous.

York commenced an investigation following Markicevic's departure, and the investigation revealed the full extent of Markicevic's misconduct. Accordingly, York sued to set aside the releases, to recover the money stolen, and to seek repayment of the severance package. The Ontario Superior Court of Justice found in favour of York stating that: "when one party has induced another party to enter into an agreement by making a material misrepresentation, the principal remedy is rescission" of the agreement (at para 145).[2] In the result, the trial judge rescinded the severance agreement, including the releases. Among other things, the trial judge additionally held that Markicevic was required to:

---

[1] Full text available online at: http://canlii.ca/t/hw0lg

[2] Full text available online at: http://canlii.ca/t/grzd2

(a) Pay damages in respect of the money stolen (totalling approximately $913,444.50)[3];

(b) Pay damages in respect of the investigation costs (totalling $200,000);

(c) Repay the severance amounts paid to him under the severance agreement ($696,166); and

(d) Pay costs of the trial to York on a full indemnity basis (the costs award against Markicevic totalled approximately $1,377,651)[4].

Markicevic appealed.

Key Findings: The Ontario Court of Appeal upheld the lower court's finding that York was induced to enter into a severance agreement by Markicevic's fraudulent misrepresentation that he was innocent of any financial dishonesty. The Court of Appeal held that this finding was supported by the evidence and that there was no palpable or overriding error. The Court of Appeal additionally stated that "it is difficult to imagine circumstances in which an employer acting responsibly would pay three years severance pay to an employee it knew had misappropriated large sums of money from it" (at para 22). The appeal was dismissed. The Court of Appeal also awarded York its costs of the appeal on a full indemnity basis.

An application for leave to appeal was filed at the Supreme Court of Canada on January 4, 2019.

(ii) *Manak v. Workers' Compensation Board of British Columbia,* 2018 BCSC 182[5]

The plaintiff, Ms. Manak, was dismissed for cause for alleged breaches of the defendant's confidentiality standards. At the time of her dismissal, Manak was 61 years old, had 36 years of service, and held the position of Client Services Manager in the Workers' Compensation Board of British Columbia's ("WCB") Long-Term Disability Department. In her role, Manak had responsibility for staff claims (claims by WorkSafe BC employees under WorkSafe BC's own legislation) and was also an "ethics advisor" who was expected to set an ethical example for her staff.

---

[3] A portion of these damages were awarded on a joint and several basis.

[4] A portion of these damages were awarded on a joint and several basis.

[5] Full text available online at: http://canlii.ca/t/hq954

During her employment, Manak inappropriately disclosed confidential management issues to other employees. For example, she disclosed details surrounding the discipline and subsequent termination of two employees. She also casually shared information about two confidential staff claims and disclosed that another staff claimant had threatened to report the handling of his unresolved claim to Global TV. Manak also frequently started conversations regarding confidential management issues with "Don't tell anyone because I could get fired, but…"

Following an internal investigation, Manak was confronted by WCB regarding her misconduct. Manak categorically denied the allegations against her. WCB questioned Manak's credibility and decided that it had just cause to terminate Manak's employment. However, given Manak's long service, WCB offered Manak the option of retiring and receiving a retirement benefit of approximately four months' salary.

Manak accepted the package and signed a release. However, she subsequently brought an action for wrongful dismissal, claiming that the release was unenforceable due to unconscionability.

Key Findings: The British Columbia Supreme Court dismissed Manak's action, finding that WCB had just cause to dismiss Manak due to her breach of WCB's confidentiality standards. The Court noted that WCB took privacy and confidentiality very seriously, and that Manak knew that breach of confidentiality protocols could lead to termination. The Court additionally found the following factors to be significant when arriving at its decision:

(a) Manak's managerial role and role as an ethics advisor put her in a position of trust and required her to serve as a model for other staff;

(b) This was not a single incident of inappropriate disclosure. Manak exhibited a pattern of serious breaches of her duty of confidentiality; and

(c) Manak was not properly forthcoming during WCB's investigation of her misconduct.

The Court also determined that, in any case, the release that Manak had signed was enforceable. Quoting the Ontario Court of Appeal's reasoning in *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573:

> [36] A party relying on the doctrine of unconscionability to set aside a transaction faces a high hurdle. A transaction may, in the eyes of one party, turn out to be foolhardy, burdensome, undesirable or improvident; however, this is not enough to cast the mantle of unconscionability over the shoulders of the other party.

Based on the evidence as a whole, the Court determined that it was "unable to conclude that the release 'is sufficiently divergent from community standards of commercial morality that it should be rescinded'" (at para 110).

Leave to appeal was filed at the British Columbia Court of Appeal on March 8, 2018.

(iii) *Ruston v. Keddco MFG. (2011) Ltd.,* 2019 ONCA 125[6]

The respondent, Mr. Ruston, was President of the appellant company, Keddco MFG. (2011) Ltd ("Keddco"), when his employment was terminated for cause. At the time of his dismissal, Ruston was 54 years old and had 11 years of service. Keddco alleged that Ruston had committed fraud, however provided Ruston with no details regarding such allegations. When Ruston advised Keddco that he would be hiring a lawyer, Keddco advised him that, if he did, it would counter-claim and that it would be a very expensive process for Ruston.

Ruston subsequently brought an action for wrongful dismissal. Keddco made good on its threat by responding to Ruston's wrongful dismissal claim with a statement of defence and counterclaim, alleging cause and claiming damages of $1,700,000 for unjust enrichment, breach of fiduciary duty, and fraud, as well as $50,000 in punitive damages.

Ruston was successful at trial. The Ontario Superior Court of Justice found that Keddco had failed to prove cause or any of its allegations against Ruston. The Court also found that Keddco's counterclaim had been a tactic to intimidate Ruston and that it had breached its obligation of good faith and fair dealing in the manner of dismissal. The Court dismissed the counterclaim in its entirety and awarded Ruston significant damages, including: damages in lieu of reasonable notice based on a 19 month notice period; punitive damages in the amount of $100,000, and moral damages in the amount of $25,000. Keddco appealed.

Key Findings: The Court of Appeal upheld the trial judge's decision. The Court of Appeal found that the 19-month notice period awarded by the trial judge was reasonable, given the applicable

[6] Full text available online at: http://canlii.ca/t/hxl80

factors. The Court additionally found that Keddco breached its duty of good faith and fair dealing in the manner of dismissal by threatening to commence litigation against Ruston. The Court of Appeal held that Keddco's actions were calculated to, and did in fact, cause Ruston stress. Similarly, the Court of Appeal upheld the original award of punitive damages, as Keddco used its counterclaim as a way to strategically intimidate Ruston.

(iv) *Klonteig v. West Kelowna (District)*, 2018 BCSC 124[7]

The plaintiff, Mr. Klonteig, was an assistant fire chief with the District of West Kelowna (the "District") when his employment was terminated for cause. At the time of his termination, Klonteig was 48 years old and had approximately five years of service with the District.

Klonteig's employment was terminated after he failed a roadside breathalyzer test and received a 90-day administrative driving prohibition for drinking and driving. At the time of the incident, Klonteig was off duty but was driving a District vehicle. Although the vehicle had a fleet number on its rear tailgate, it bore no other indications that it belonged to the District or the fire service.

On the same day of the incident, Klonteig reported what had happened to the District. Klonteig was distraught, remorseful and forthright about the incident. Although Klonteig had an unblemished employment record, the District decided to dismiss Klonteig for cause. In asserting just cause, the District noted that the plaintiff's conduct was incompatible with his duty to ensure public safety and that his conduct reflected poorly on the District. Klonteig subsequently brought an action for wrongful dismissal.

Key Findings: The British Columbia Supreme Court concluded that the District did not have just cause to dismiss Klonteig. While the Court accepted that off-duty conduct may amount to cause, the Court asserted that such conduct must be prejudicial to the interests or reputation of the employer. The Court found that Klonteig's off-duty conduct was not in fact prejudicial to the interests or reputation of the District. The Court highlighted the following facts when arriving at this conclusion: (a) Klonteig was not representing the District when he engaged in the conduct that led to the suspension of his licence, (b) the vehicle Klonteig was driving, although belonging

[7] Full text available online at: http://canlii.ca/t/hq26q

to the District, was unmarked as such, and (c) there was no public knowledge of Klonteig's administrative suspension.

Further, the Court highlighted the fact that Klonteig's conduct was not of the same moral reprehensibility as other off-duty conduct that warranted just cause for dismissal, such as (referring to other case law where cause for termination was demonstrated) possession of child pornography, consorting with a prostitute on company premises, breach of privacy, or a dishonest tax scheme engaged in by a chartered accountant.

The Court accepted the fact that the District's community members would expect a senior employee responsible for public safety to avoid the risk of public harm. However, the Court noted that Klonteig was not the public face of the fire department and that his role was primarily administrative.

Klonteig was awarded five months' salary in lieu of notice, which was the notice period that he was entitled to under his employment contract in the event of a without cause dismissal.

(v) *Belyea v. Syncrude Canada Ltd.*, 2018 ABQB 132[8]

The plaintiff, Mr. Belyea, was employed with the defendant, Syncrude Canada Ltd. ("Syncrude"), as a crane operator. One day, in the lunchroom, Belyea encountered a junior employee sitting in Belyea's "special chair". Belyea asked the junior employee to move, but the junior employee refused. As a result, Belyea angerly dropped or threw a chain at the junior employee's hand, spilling the junior employee's food.

Syncrude conducted an investigation and concluded that Belyea had breached Syncrude's Treatment of Employees Policy pertaining to physical acts of violence. Following the investigation, Syncrude provided Belyea with an opportunity to provide an explanation for his conduct. Belyea maintained that he dropped the chain on the floor and that he did not hit his co-worker. Belyea was not remorseful and refused to accept responsibility for his behaviour. Accordingly, Syncrude terminated Belyea's employment for cause for breaching the Treatment of Employees Policy. At the time of his dismissal, Belyea had 10 years of service and was 58 years old. Belyea subsequently sued for wrongful dismissal.

[8] Full text available online at: http://canlii.ca/t/hql3n

Key Findings: The Court of Queen's Bench of Alberta held that Syncrude had just cause to terminate Belyea's employment. Based on the evidence, the Court found that Belyea did in fact throw a chain at the junior employee in an effort to intimidate him. The Court also noted that the chain incident was not the first aggressive incident involving Belyea. Belyea had previously (a) confronted another employee in an inappropriate manner; (b) had an interpersonal conflict with a customer; and (c) engaged in a heated exchange with a co-worker. The Court held that the chain incident, in combination with Belyea's history of workplace aggression, was sufficient to constitute just cause for dismissal. The Court found the following facts to be significant when arriving this conclusion: (a) Belyea was aware of, and had been trained on, Syncrude's Treatment of Employees Policy; (b) Belyea had been warned that termination was a possible outcome after his prior corrective action; and (c) Belyea failed to accept responsibility or show remorse for his actions.

B. ENFORCEABILITY OF TERMINATION PROVISIONS

In prior years, we summarized recent developments in the interpretation of termination provisions, and in the last year, the case law continues to develop. Generally speaking, an employee is entitled to common law reasonable notice of the termination of his or her employment without cause (or pay in lieu of notice). However, an employer can contract out of this obligation by including a termination provision in the employee's employment agreement stating otherwise, so long as the termination provision complies with the minimum standards in the applicable employment standards legislation. If the provision does not comply with those minimum standards, then the employee is entitled to common law reasonable notice entitlements.

In one recent decision, the Ontario Court of Appeal clarified that termination provisions must be read as a whole, rather than interpreted in constituent parts. Other recent decisions in British Columbia serve as a reminder that enforceable termination provisions will not safeguard employers from punitive or aggravated damage awards in wrongful dismissal cases.

(i) *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571[9]

Mr. Amberber brought a wrongful dismissal claim against his former employer, IBM Canada Ltd. ("IBM"), after he was terminated on a without cause basis in July 2016.

Amberber commenced his employment with IBM in March 2015, although IBM recognized his previous service with an IBM customer since September 25, 2000. At the time of termination, Amberber had a salary of $65,507.

The issue in the case was the enforceability of Amberber's termination clause, which stated:

> TERMINATION OF EMPLOYMENT
>
> If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment (at para 6).

IBM had paid Amberber for his working notice period and had continued his benefits and pension contributions. In addition to the working notice period, Amberber received $24,121.59 as a termination payment, which was equivalent to 19.4 weeks of salary.

Amberber argued that the termination clause was not enforceable as it failed to rebut the presumption at common law that he was entitled to reasonable notice of termination. As such, Amberber claimed a 16 month notice period.

On a motion for summary judgment, the Ontario Superior Court of Justice concluded that the termination clause was ambiguous and did not clearly set out an intention to deprive the employee of his entitlements at common law. The motion judge held that the termination clause consisted

---

[9] Full text available online at: http://canlii.ca/t/hsnsk.

of three separate parts: the “options provision”; the “inclusive payment provision” and the “failsafe provision” (at para 13):

> **Options Provision**
>
> If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary.
>
> **Inclusive Payment Provision**
>
> This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation.
>
> **Failsafe Provision**
>
> In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

The motion judge held it was not clear whether the “inclusive payment provision” was meant to apply to the “failsafe provision”, and therefore the entire termination provision was found to be unenforceable (at para 15). IBM appealed.

Key Findings: The Court of Appeal overturned the motion judge’s decision, allowing IBM’s appeal and confirming that the termination clause had to be read and interpreted as a whole (at para 59). The Court of Appeal stated:

> The fundamental error made by the motion judge is that she subdivided the termination clause into what she regarded as its constituent parts and interpreted them individually. In my view, the individual sentences of the clause cannot be interpreted on their own. Rather, the clause must be interpreted as a whole (at para 59)
>
> …
>
> The parties have set out a formula for calculating the amounts owing to a terminated employee. The amounts owing include any entitlement under employment standards legislation and the common law. To the extent that employment standards legislation provides for something superior, the employee will receive the statutory entitlement (at para 61).

In upholding the termination clause, the Court of Appeal reiterated Laskin J.A.’s finding from *Chilton v. Co-operators General Insurance Co.* (1997) 32 O.R. (3d) 161 (Ont. C.A.), that “the court

should not strain to create an ambiguity where none exists" (at para 63). The Court of Appeal awarded IBM costs for both the motion and the appeal.

(ii) *Bailey v. Service Corporation International (Canada) ULC,* 2018 BCSC 235[10]

Donald Bailey, a 60-year-old sales employee, had 17 years of service when he was dismissed by Service Corporation International ("SCI"). Bailey had experienced a health issue that made him unable to work for 2.5 months. He provided his employer with a note from his physician in support of this assertion. Bailey was not paid a salary during his time off work, and his claim for short-term disability ("STD") was also denied. While he was in the process of appealing his STD decision, SCI dismissed Bailey for cause, alleging that he had abandoned his employment. Bailey was not provided with any notice of his termination, and only discovered the termination when Manulife informed him that since he was no longer an employee of SCI, he was no longer eligible for medical benefits (at para 6). Bailey launched an action for wrongful dismissal.

At the British Columbia Supreme Court, SCI argued that even if it did not have cause to terminate Bailey's employment, the termination clause in his employment contract restricted his entitlement to eight weeks' notice based on his length of service:

> Counselor's employment may be terminated by either party without cause, upon giving written notice to the other party as required under the Employment Standards Act of British Columbia (para 148).

Key Findings: The Court rejected SCI's abandonment argument and held that Bailey had been wrongfully dismissed while he was on an approved leave of absence. Although the Court acknowledged that the termination clause in Bailey's employment contract was enforceable and therefore restricted his entitlement to eight weeks' notice, it held that Bailey was entitled to both aggravated and punitive damages due to the manner of his dismissal.

The Court awarded Bailey $25,000 in aggravated damages. Citing the principles on aggravated damages from *Keays v. Honda Canada Inc.,* 2008 SCC 39, the Court held that it was "easy to conclude that SCI's manner of termination of Mr. Bailey breached the employer's duty of good faith and fair dealing in a whole host of ways, including:

[10] Full text available online at: http://canlii.ca/t/hqhnt.

> 1. failing to take into account Mr. Bailey's long period of service to SCI, during which the company had given him various awards and prizes for good performance;
>
> 2. firing him when he was known to be: sick; seeking medical care; likely to need or want to continue on the company's extended medical plan; and costing the company nothing in terms of salary;
>
> 3. not giving Mr. Bailey a chance to respond to Mr. Boyle's unfair assumption that he had abandoned his employment;
>
> 4. not telling him he was dismissed, leaving it for his wife to discover it accidentally through a denial of medical benefits (and without any notice that the medical benefits would be cut off retroactively)" (at paras 205-206).

In addition, Bailey was awarded punitive damages of $110,000 for SCI's "harsh and reprehensible" conduct (at para 217). The Court held that the $110,000 award was both "meaningful" and "proportionate" and would serve as a "deterrent to SCI so that it does not choose to treat its employees so maliciously and callously as it did in this case" (at para 225).

(iii) *Cottrill v. Utopia Day Spas and Salons Ltd.*, 2018 BCCA 383[11]

Ms. Cottrill brought a wrongful dismissal claim against Utopia Day Spas and Salons Ltd. ("Utopia") after she was dismissed for cause due to "poor performance". Cottrill had worked as a skincare therapist at Utopia for approximately 11 years before her dismissal. In March 2015, Utopia had a meeting with Cottrill regarding deficiencies in her performance and provided Cottrill with a letter advising her that if she failed to improve within three-months, her employment could be terminated. At the end of the three-month period, Cottrill's employment was terminated for failing to meet the required performance standards.

Key Findings: The British Columbia Supreme Court[12] held that Utopia did not have cause to terminate Cottrill's employment. The Court found that Utopia's vague accusations that Cottrill was complacent and had a poor attitude did not rise to the "serious or gross incompetence" level required for cause terminations (at paras 61 and 97). In addition, the Court found that Cottrill's performance did in fact improve over the three-month period.

---

[11] Full text available online at: http://canlii.ca/t/hvk2d

[12] Full text available online at: http://canlii.ca/t/h3j2w

In determining her notice entitlements, the Court reviewed Cottrill's 2004 and 2014 employment contracts. The Court held the 2014 contract was unenforceable for lack of fresh consideration at the time of signing. Therefore, her 2004 contract governed, which limited her termination entitlements to the statutory minimums (eight weeks pay in lieu of notice). The termination clause in the 2004 contract stated:

> The Employer may terminate the Employment of the Employee without cause or notice in accordance of the *Employment Standards Act* of British Columbia (para 101).

However, the Court awarded Cottrill $15,000 in aggravated damages for the Utopia's "lack of good faith and unfairness" in the manner of Cottrill's dismissal (at para 137). The Court found that the "events clearly had a profound effect on the plaintiff" and caused her "emotional distress …well beyond the distress from the fact of dismissal" (at para 137).

British Columbia Court of Appeal: The sole ground of appeal was the $15,000 aggravated damages award. The British Columbia Court of Appeal overruled the lower court on this point and set aside the damages award. The Court of Appeal emphasized that "unfairness" in the manner of dismissal alone does not justify an aggravated damages award. The Court of Appeal stated:

> In this case… there was no evidence from the plaintiff or from family members, friends or third parties concerning the impact of the termination on Ms. Cottrill and her mental state. Although not required, there was no expert evidence, medical or otherwise. The only evidence of mental distress is that Ms. Cottrill cried during the March meeting, following which she had to go home early because she was so upset, and that at the June meeting, she went numb and could not take anything in. The evidence of Ms. Cottrill's reactions at the two meetings at its highest establishes a transient upset. It falls well short of the legal standard that requires a serious and prolonged disruption that transcends ordinary emotional upset or distress (at para 18).

Cottrill's application for leave to appeal to the Supreme Court of Canada was dismissed on April 11, 2019.

C. NOTICE PERIODS AND LONG-SERVICE EMPLOYEES

Dismissing long-service employees can present unique challenges to an employer. The following two cases demonstrate that courts are willing to extend the usual 24-month cap on reasonable notice periods to employees of advanced age, who have spent most of their working lives with the same employer.

These cases provide a useful reminder for employers to review employment agreements of their long service employees. To avoid a lengthy notice period, these employment agreements should contain well drafted and enforceable termination provisions.

(i) *Dawe v. Equitable Life Insurance,* 2018 ONSC 3130[13]

Michael Dawe was a 62-year-old Senior Vice President with 37 years of service with Equitable Life Insurance (and its predecessor, Allstate Life Insurance Company of Canada) ("Equitable Life") when he was dismissed on a without cause basis. In his last year of employment, Dawe earned $249,000 in base salary and received a $379,585 bonus. The main issues at the motion for summary judgement were (i) his appropriate notice period and (ii) his entitlement to certain bonuses under Equitable Life's bonus plans. For the purposes of the paper, we will focus on his appropriate notice period.

Dawe claimed a 30 month notice period given his age, length of service, senior executive position, and lack of alternative employment. Equitable Life argued that the notice period was to be limited to 24 months.

Key Findings: The Ontario Superior Court acknowledged that, as a general principle, 24 months was the maximum notice period awarded in most employment cases. However, the Court held that "each case is unique" and the circumstances of the individual employee must be considered (at para 31). The Court also acknowledged that there has been a shift in societal views regarding retirement, noting that "[f]or many years, the usual retirement age was considered to be 65", but now many employees continue to work past 65 (at para 31).

The Court found that Dawe's age and length of service were significant factors in considering his reasonable notice period. His mitigation efforts demonstrated the lack of available opportunities for a 62-year-old executive who had "devoted his entire working career to Equitable Life" (at para 33). The Court held that "when there is no comparable employment available, termination without cause is tantamount to a forced retirement" (at para 34).

[13] Full text available online at: http://canlii.ca/t/hs6kc

The Court accepted that Dawe was committed to working at Equitable Life until at least age 65, and therefore was prepared to award him a minimum 36 month notice period (at para 36). However, the Court only awarded 30 months as this was all that Dawe had sought in his claim.

The Ontario Court of Appeal heard Equitable Life's appeal on February 4, 2019 and the decision remains under reserve.

(ii) *Saikaly v. Akman Construction Ltd.*, 2019 ONSC 799[14]

In *Saikaly*, the Ontario Superior Court of Justice awarded 24 months' notice to a 60-year old office manager with 12 years of service upon finding that he had been wrongfully terminated. At the time of termination, Saikaly had a salary of $69,143.40.

Saikaly's employment was terminated for cause for an alleged wrongdoing involving certain financial transactions. Saikaly denied the wrongdoing and argued he was never provided with any details regarding the allegations, nor was he interviewed or involved in the investigation (at para 16). As such, Saikaly filed a wrongful dismissal claim. Akman Construction Ltd. ("Akman") failed to file a statement of defence. Despite many attempts to contact the defendant, Akman was eventually noted in default. Saikaly then scheduled a motion for default judgement, but the defendant did not attend.

Key Findings: The Court held that having been noted in default, the defendant was "deemed to admit the truth of all allegations of fact made in the statement of claim" (at para 15). Accordingly, the Court accepted Saikaly's claim that he (a) did not commit the alleged wrongdoing and (b) was terminated without cause (at para 18).

In deciding that the appropriate notice period was 24 months, the Court concluded the following:

> • Although lacking a formal accounting designation, in the 12 years that he was employed by the defendant, Mr. Saikaly demonstrated the knowledge, skill, and trustworthiness to acquire and remain in the position of Office Manager;
>
> • Mr. Saikaly's 12 years of service (from approximately age 48 to age 60) is deserving of consideration; and

[14] Full text available online at: http://canlii.ca/t/hx9x1

> • At age 60, and lacking a formal designation, Mr. Saikaly is competing against younger and formally trained or educated individuals for a position equivalent to the one he held with the defendant (at para 26).

The Court acknowledged that for some employees over the age 60, "a notice period in excess is 30 months might be reasonable" (at para 28). However, the Court compared Saikaly's position to that of Mr. Dawe from *Dawe v Equitable Life Insurance Company* (a Senior Vice President with 37 years of service), as well as other similar past cases, and held that the nature and longevity of Saikaly's employment did not warrant a 30 month notice period.

Saikaly was ultimately awarded $138,286.80 in compensation in lieu of notice, $13,828.68 in benefits and $5,531.47 in vacation pay. The Court also ordered Akman to revise Saikaly's Record of Employment to reflect a without cause termination.

D. UPDATES ON RECENT APPEALS

The final section of this paper discusses recent appeals of notable dismissal law cases.

Last year, this paper discussed the Ontario Superior Court of Justice's decision in *Wood v. CTS of Canada Co*., 2017 ONSC 5695,[15] which addressed notice requirements in the context of mass terminations. In 2018, the Ontario Court of Appeal overturned significant parts of the earlier 2017 Superior Court decision.

Further, the Supreme Court of Canada has recently granted leave to appeal in *David Matthews v. Ocean Nutrition Canada Limited*[16], a case regarding a dispute over payment of significant long-term incentive entitlements to an employee alleging constructive dismissal. The Supreme Court of Canada's decision will hopefully bring some clarity as to whether employers can contract out of an employee's entitlement to incentive compensation post-termination.

(i) *Wood v. CTS of Canada Co.,* 2018 ONCA 758[17]

The Ontario *Employment Standards Act, 2000* (the "ESA") sets out specific notice requirements for what is often referred to as a "mass termination". These mass termination requirements arise

---

[15] Full text available online at: http://canlii.ca/t/h6b3j

[16] *David Matthews v. Ocean Nutrition Canada Limited*, 2018 NSCA 44, leave to appeal to S.C.C. granted, 2019 CanLII 5975 (SCC).

[17] Full text available online at: http://canlii.ca/t/hv559

where an employer terminates the employment of 50 or more employees in a four-week period. Employers must provide at least eight weeks' notice of termination to all affected employees and to the Ministry of Labour (the precise amount of notice depends on the number of employees being dismissed). When providing notice to the Ministry of Labour, employers are required to submit a prescribed form (Form 1) and must post a copy of this form in the workplace.

In February 2014, CTS of Canada Co. ("CTS") advised the employees at its automobile manufacturing plant in Mississauga, Ontario that the plant would be closing in the first half of 2015. The decision to close the plant resulted in a mass termination. On April 17, 2014, 77 CTS employees received written notice that their employment would be terminated effective March 2015 (which was later extended to June 2015). In total, this provided these employees with over 12 months of working notice. On May 12, 2015, CTS served the Ministry of Labour with the Form 1 notice and posted the Form 1 notice at the plant, in accordance with its requirement to provide notice of a mass termination to the Ministry of Labour pursuant to the ESA.

A class of 74 employees subsequently brought an action alleging that CTS had breached the ESA by failing to submit the Form 1 notice to the Ministry of Labour in April 2014, when the company first notified employees that their employment would be terminated. The plaintiffs argued that, as a result, CTS could not claim credit for the working notice provided prior to when the Form 1 notice was submitted. Conversely, CTS argued that the Form 1 notice only had to be submitted at the beginning of the minimum eight-week statutory notice period.

Key Findings (Ontario Superior Court of Justice): On a summary judgment motion, the Ontario Superior Court of Justice held that a proper interpretation of the ESA requires employers to give notice of mass termination on the first day of any notice period that is provided to employees (which, in this case, was April 17, 2014). The Court additionally held that, as the April 2014 termination letters were delivered prior to CTS giving Form 1 notice on May 12, 2015, they could not be relied upon by CTS as providing working notice of termination. For that reason, the Court concluded that CTS was not entitled to credit for any working notice that was given prior to submitting the Form 1 notice, whether pursuant to the ESA or common law.

The Court also found that during the working notice period, CTS encouraged many of its employees to work overtime hours contrary to the ESA in order to meet plant closure goals. The

Court concluded that CTS was not entitled to credit for working notice during any week in which a class member worked overtime contrary to the ESA. CTS appealed the motion judge's decision.

Key Findings (Ontario Court of Appeal): The following three issues were addressed in the Court of Appeal decision.

First, the Court addressed whether CTS was required to submit and post the Form 1 notice in April 2014, when notice of termination was given to the employees. The Court of Appeal overturned the motion judge's finding that the ESA required CTS to submit and post the Form 1 notice when it gave notice of termination to employees. The Court confirmed that employers are only required to submit and post the Form 1 notice at the beginning of the prescribed statutory notice period. Accordingly, CTS was entitled to credit for the working notice provided to the applicable employees. As CTS was 12 days late in submitting and posting the Form 1 notice, class members were entitled to a further 12 days' pay in lieu of notice.

Second, the court addressed whether parts of the working notice period were invalid as a result of overtime hours worked during the notice period. The Court upheld the motion judge's finding that CTS was not entitled to credit for working notice during any week in which a plaintiff worked excessive overtime contrary to the ESA. The Court noted that it is relevant to consider the quality of the opportunity given to an employee to find new employment when determining the period of reasonable notice.

Third, the court addressed whether five employees who worked more than 13 weeks beyond the original termination date received effective notice of termination in April 2014. The Court noted that the ESA permits employers to continue to provide temporary work to employees for up to 13 weeks after the termination date specified in the notice of termination, without giving a further notice of termination. However, the Court found that if temporary work exceeds 13 weeks, fresh notice is required and it must be clear, unambiguous, and include a final termination date. The Court therefore held that the five employees who worked more than 13 weeks beyond their original termination date only received common law working notice from the date on which they received notice of their final termination date. The Court of Appeal held that multiple extensions to the final date of termination nullified the initial notice given in April 2014.

An application for leave to appeal from the judgment of the Ontario Court of Appeal was dismissed with costs on April 18, 2019.

(ii) ***Ocean Nutrition Canada Ltd. v. Matthews, 2*****018 NSCA 44**[18]
(leave to appeal to SCC requested)

Mr. Matthews was employed by Ocean Nutrition Canada Ltd. ("Ocean Nutrition") from January 1997 until his resignation in June 2011. At the time of his resignation, Mr. Matthews held the role of Vice President, New and Emerging Technologies and reported directly to the Chief Operating Officer, Emond. After resigning, Matthews brought a constructive dismissal claim against Ocean Nutrition. The Nova Scotia Supreme Court found that Matthews had been constructively dismissed, awarded him a 15-month notice period and damages of approximately $1.085 million. A large portion of the damages award related to a Long-Term Incentive Plan ("LTIP"), which provided payments to certain executives upon the sale of the Company. Ocean Nutrition was sold 13 months after Matthews' resignation. The lower court held that the LTIP plan would have crystallized if Matthews had remained employed throughout the notice period, and therefore he was entitled to LTIP payments. Ocean Nutrition appealed.

Key Findings: The Nova Scotia Court of Appeal allowed the appeal in part. Although the Court of Appeal upheld the constructive dismissal finding and the 15-month notice period, it disagreed with the lower court's findings with respect to the LTIP entitlement. The Court of Appeal held:

> The hearing judge confuses an employee's common law right to reasonable notice, with the employee's ability to recover damages arising under an incentive plan. The ability of Matthews to receive damages under the Long Term Incentive Plan is clearly governed by the words of the agreement. It is not a situation where the employer is seeking to limit the amounts that an individual would be entitled to at common law, but rather, whether the employee qualifies pursuant to the terms of the agreement (at para 63).

The Court of Appeal held that the language of the LTIP was "plain and unambiguous" in precluding payment to employees who had resigned (at para 74). The language of the LTIP specifically stated that the plan would be of "no force and effect" if the employee ceased to be an employee of Ocean Nutrition "regardless of whether the [e]mployee resigns or is terminated, with or without

[18] Full text of Court of Appeal decision available online at: http://canlii.ca/t/hs5fs

cause" (at para 67). The Court of Appeal held that there was no ambiguity in this clause; if Matthews resigned, he had no right to recover under the LTIP (at para 88).

Scanlan J.A., dissenting, held that the LTIP award of $1.085 million should be upheld. He found that the "common law duty of honesty" was implicit in both the LTIP and Matthews employment contract and that Emond breached those duties in the manner of Matthews' dismissal (at para 210):

> I do not accept that the parties intended to agree that a rogue manager such as Emond could engineer the dismissal of a valued long-term employee through a series of lies, deceit and manipulation so as to result in that employee not being entitled to share in the value he was so essential in creating (at para 148).

The Supreme Court of Canada is expected to hear Matthews' appeal in the fall of 2019.