

You Can Go Your Own Way: Notice Periods and the Aging Workforce in Ontario

Thursday, November 1, 2018

Lindsey Buckingham joined Fleetwood Mac in 1974. On April 9, 2018, Fleetwood Mac, citing no cause, confirmed the rumours that Mr. Buckingham would not be joining the band on its 50+ date North American farewell tour. Mr. Buckingham considered himself fired and has sued the band for \$12 million, the amount he claims he would have earned on this tour. The question arises as to what Mr. Buckingham, a 68-year old lead guitarist and singer with some 44 years of on again, off again service with the band and only very dim prospects of a comparably successful solo career, might receive as notice had Fleetwood Mac been an Ontario-based band and he an employee of that band? The answer, a potential landslide.

In 2018, Michael Dawe, 62-year old Senior Vice President with 37 years' service at The Equitable Life Insurance Company of Canada asked the Ontario Superior Court of Justice to award him 30-months' notice.¹ The court accepted Mr. Dawe's position that he had intended to work until retirement at age 65 and that there were no comparable employment opportunities for him. The court considered the particular circumstances of an older employee in a post-mandatory retirement world as factors that should be considered in assessing the notice period. The court awarded Mr. Dawe's requested 30-month notice period. In fact, on its own, the court went further. It found that Mr. Dawe should have been allowed to retire "on his own terms" and with no comparable employment opportunities "felt that this case warranted a *minimum of a 36 month notice period.*"

The case raises some interesting questions for employers in managing an aging workforce. Is there now a right to retire on your own terms? This seems unlikely, but the court leaves the door open to such a question. Will age and the prospect of re-employment have a greater impact on notice periods as our workforce ages? The highlighted quote above seems to confirm this.

Also, whatever happened to the 24-month notice cap? In 2006, the Ontario Court of Appeal wrote:

Although it is true that a reasonable notice of employment termination must be determined on a case-specific basis and there is no absolute limit or 'cap' on what constitutes reasonable notice, generally only exceptional circumstances will support a base notice period in excess of 24 months.²

Unfortunately, the Court of Appeal did not elaborate on what might be an exceptional circumstance. Certainly, it is hard to see anything exceptional about Mr. Dawe's circumstances that would not have been on the Court of Appeals radar in 2006. Yes, he had long service time, but that alone is not exceptional and being 62 and planning to retire at age 65 must be a fairly typical state of affairs. This is not the first case in recent years to break through the Court of Appeal's notice cap and it may not be the last.

Like Mr. Dawe, Mr. Buckingham may have had retirement plans. After all, yesterday's gone. Should he have been permitted one last farewell tour and the chance to retire on his own terms? Had Mr. Buckingham's rights been governed by Ontario law, he might look for damages beyond just one farewell tour. There is always another farewell tour. Of course, Mr.

Buckingham, in his own time, replaced Bob Welch who, in his time, replaced the incomparable Peter Green. Perhaps Mr. Buckingham should take his own advice: don't you look back.

¹ *Michael Dawe v. The Equitable Life Insurance Company of Canada* 2018 ONSC 3130.

² *Lowndes v. Summit Ford Sales Ltd.*, [2006] O.J. No. 13 (Ont. C.A.)

AUTHOR

Robert Weir

T 416 367 6248

RWeir@blg.com

BLG OFFICES

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T +1.403.232.9500
F +1.403.266.1395

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T +1.514.954.2555
F +1.514.879.9015

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T +1.613.237.5160
F +1.613.230.8842

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2018 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.