

THE PRICE TO ENTICE: THREE-YEAR EMPLOYEE AWARDED 14 MONTHS OF NOTICE

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While there is some element of courtship at the beginning of every employment relationship, the Ontario Superior Court of Justice (the "Court") in *Rodgers v CEVA Freight Canada Corp.* provides a caution for employers who entice away employees from secure employment. Although the employee's short service and the length of the notice period may cause employers to do a double-take, this decision illustrates the potential exposure when dismissing a short-service employee who has been enticed away from another position.

Inducement Cancels Out Short-Service

Rodgers had been the President of a transportation company for 11 years, earning in excess of \$320,000 per year, when he was approached by CEVA about a job opportunity. After seven interviews, Rodgers turned down CEVA's employment offer. Thereafter, CEVA made a second offer with a higher salary and a \$40,000 signing bonus, which was accepted by Rodgers.

As a condition of employment, Rodgers purchased shares in CEVA Investments for \$102,000 – the equivalent of 4.5 months' salary. After his employment was terminated, Rodgers was first advised that he could not sell his shares and later advised that his shares were worthless.

Based on the foregoing facts, Rodgers argued that he had been induced away from secure employment by CEVA, which cancelled out his short service in determining the period of reasonable notice.

The Court reviewed the circumstances of the recruitment and found that there was "some measure" of inducement to leave his previous position and join CEVA. Although CEVA did not give Rodgers a specific assurance of long-term job security, based on the required investment, the Court found that there was at least an implied representation that Rodgers was about to embark upon a long-term employment relationship with CEVA.

Determining the Notice Period

The Court looked at Rodgers' age, his position as the Canadian manager of CEVA's operations, his limited education, the fact that his work experience was confined to a single industry, the limited number of similar

positions, the fact that Rodgers was required to make a significant investment with CEVA, and his recruitment in general in setting a notice period of fourteen months. While his employment with CEVA was for a short period, this was the only factor that would point towards a shorter notice period.

Lesson for Employers

Although the appropriate period of reasonable is determined on a case-by-case basis, this decision serves as an important reminder of three key considerations employers should take into account when contemplating recruiting or terminating an employee:

- **Termination Clause.** Although some employers are hesitant about drafting termination clauses at the outset of an employment relationship, a carefully drafted and negotiated termination clause is a powerful tool that can limit or at least expressly quantify the employer's liabilities in respect of an employee at the termination of the employment relationship. Termination clauses do not have to be limited to the minimums provided for under provincial employment standards legislation – they can be more generous than the minimums. However, without express language dealing with an employee's entitlements upon termination, an employer's liabilities are left to the common law and judicial discretion, which are difficult to predict.
- **Length of Service.** While length of service is certainly one of the most easily quantifiable factors in setting the notice period, absent express contractual language indicating otherwise, there are no assurance that a short service employee will be awarded damages based on a short reasonable notice period. Courts are becoming more generous to short-service employees so employers have to change their thinking and recognize that short-service employees could be entitled to a disproportionate notice period.
- **Inducement.** Even where job security is not expressly promised, or even discussed, the method of recruitment and offer of employment itself can create the implied promise of job security and amount to inducement. If there is no clause in the employment agreement that deals with termination entitlements, the employer is taking the risk that a Court will set a disproportionate notice period.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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