

61-year-old given 2 months' notice after 9 months' service

'Advance age may be considered an advantage for senior executives'

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When an experienced worker in a booming industry is fired, older age may sometimes be an advantage rather than a drawback when considering the likelihood of finding similar employment – judging by a recent court decision.

“Advanced age may be considered an advantage for senior executives. It will depend on the industry and position at issue, the circumstances of the former executive, and the state of the economy,” says Allyson Lee, an employment lawyer at Sherrard Kuzz in Toronto, in talking to *Canadian HR Reporter*.

Background of case

Trent Flack, 61, was a finance manager at Whiteoak Ford Lincoln Sales, a car dealership in Mississauga, Ont. Hired in April 2019, his role involved selling financial products to customers, working with the dealership’s sales team to finalize car sales, and liaising with providers of financing.

Flack was one of five finance managers, reporting to both the general manager and the sales manager with no direct reports of his own.

On Jan. 10, 2020, Whiteoak terminated Flack’s employment without notice. He quickly received a job offer for a position in Hamilton, but he felt it wasn’t suitable; he had another job prospect lined up in March, but the pandemic hit and the opportunity was lost. In June, as some businesses started to open up after the pandemic-related lockdown, he found employment.

Flack sued Whiteoak for wrongful dismissal, claiming that he was entitled to a reasonable notice period of eight months. Whiteoak countered with closer to two months, given that he was only with the dealership for nine months and he was a salesperson — a position with high turnover, particularly in that industry.

The Ontario Superior Court of Justice referred to the traditional analytical framework for determining the length of the reasonable notice period factoring in the character of the employment, the employee's length of service, the employee's age, and the availability of similar employment in relation to his experience, training, and qualifications.

The court found that the importance of an employee's character of employment wasn't as important as it used to be, as it created "implicit assumptions that certain types of employment required a longer notice than others where higher-paid executive roles tended to receive more generous treatment than more traditional working-class jobs." However, it was still relevant because an employee who had more of a "custom" fit with the employer would likely need more time to find similar employment, the court said.

The court auto dealership sector was "relatively active" for employees with Flack's combination of experience and track record, found the court, particularly since his income was tied to his performance and could be easily assessed by prospective employers.

The court also found that Flack's nine months of service wasn't a significant factor in the likelihood of finding another job, as his three previous positions were also of short duration — which was fairly common for the type of work and the industry. This indicated "a fluid job market characterized by relatively frequent turnover," the court said.

Whiteoak did not entice Flack away from a long-term employer, Flack wasn't a high-level executive, and he was one of five people performing similar tasks, found the court. These all pointed to better job prospects in the short term and didn't necessitate a longer notice period.

A dismissed employee's advanced age helped his notice entitlement, but his [lack of mitigation](#) efforts hurt, a B.C. court found.

Advanced age can have advantages

As for Flack's age of 61, the court found that advanced age wasn't always a disadvantage that could warrant a longer notice period. The evidence indicated that Flack's experience and skills were an advantage that allowed him to move between

multiple short-term jobs before he joined Whiteoak and would likely help him find another job before too long.

“Changes to mandatory retirement rules and the aging of the baby boom generation have also caused considerable social changes to the expectations of employers and employees alike: outside of the shrinking defined-benefit plan but non-union universe, the once automatic assumption of retirement at age 65 is at best a guideline with many remaining in the workforce for years after that age,” said the court.

Similarly, the nature of the industry provided “robust and open” market conditions for someone with Flack’s skills and experience, as evidenced by the fact that he immediately started looking for work and had two possibilities within the first couple of months. Even though the pandemic shut things down for a while, Flack found a job shortly after the initial lockdown lifted in June 2020. As a result, the availability of similar employment was not a factor in lengthening the notice period, the court said.

A 70-year-old B.C. worker was entitled to three months’ notice after [three days of work](#) because he wasn’t given a chance to improve before being fired.

Age ‘a neutral factor’ in decision

“[In this case], age was a neutral factor as he was in a busy industry where his maturity and experience outweighed any detriment from being 61,” says Allyson Lee.

Although COVID-19 affected Flack’s job search for at least a couple of months, the court determined that shouldn’t be a factor because it happened two months after Whiteoak terminated his employment. This isn’t surprising, as notice periods are determined based on the conditions at the time of termination, says Lee.

“When Flack was terminated, both employer and employee would have predicted a quick re-employment,” she says. “COVID-19 was an event subsequent to termination that neither could have foreseen.”

“It was therefore unfair if sympathy for Flack led to an extended notice period.”

The court determined that two months was an appropriate amount of reasonable notice and ordered Whiteoak and Flack to figure out the monetary value of that notice.

Employers should note two key elements from the court’s decision, says Lee.

“First, COVID-19 may not extend a notice period if the employee would have been quickly re-employed but for the pandemic. Second, particularly for short-service employees, advanced age and a high-earning position may not automatically increase the notice period.”

See *Flack v. Whiteoak Ford Lincoln Sales Limited*, 2021 ONSC 7176.