CITATION: Rubin v. Home Depot Canada Inc., 2012 ONSC 3053
COURT FILE NO.: CV-11-433952
DATE: 20120525

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ERIC RUBIN	)	*Philip R. White*, for the Plaintiff (Moving Party)
	)	
Plaintiff	)	
(Moving Party)	)	
	)	
– and –	)	
	)	
HOME DEPOT CANADA INC.	)	*Christian Paquette*, for the Defendant (Responding Party)
	)	
Defendant	)	
(Responding Party	)	
	)	
	)	
	)	
	)	**HEARD: March 2, 2012**

LEDERER J.:

Introduction

[1] This is a motion for summary judgment brought by the plaintiff. On the day he was fired from his job, Eric Rubin signed a release. It is his view that, given the circumstances in which it was signed, the release should not be enforced. On the motion, Eric Rubin seeks damages in the amount of $72,076.36, which represents twenty months as reasonable notice for the dismissal.

Background

[2] Eric Rubin had been employed by Home Depot Canada Inc. and a predecessor since 1991. On July 28, 2011, without any prior warning, he was terminated. Two days earlier, he had been instructed to and, on July 28, 2011, he attended a meeting. He was not advised of its purpose and assumed it was a "normal business meeting". The meeting lasted only a few minutes. As it began, Eric Rubin was given a letter terminating his employment and was told that "this is your last day". The letter advised that "your current position, as a Competitive Shopper, no longer exists effective today".

[3] The termination letter "offered" twenty-eight weeks pay in lieu of notice in the amount of $30,977.81. This was said to "exceed our obligations under the Employment Standards Act" in circumstances where the legislation required that Eric Rubin be paid twenty-seven and three-quarter weeks pay in lieu of notice. The "offer" was to continue Eric Rubin's medical, dental and basic life insurance for twenty-eight weeks (until February 9, 2012) or the date that Eric Rubin obtained alternative employment. His Short-Term Disability ("STD") and Long-Term Disability ("LTD") benefits were to be discontinued after eight weeks (September 22, 2011), which was the notice period required by the *Employment Standards Act, 2000,* S.O. 2000 c. 41 There is no reference to his Accidental Death and Dismemberment coverage ("AD&D") which, pursuant to the *Employment Standards Act, 2000,* was required to be maintained for eight weeks. Counsel for Eric Rubin understood this to mean that this benefit was to be discontinued. The affidavit of Stephen Fraser, the store manager, who advised Eric Rubin that he was terminated, says Eric Rubin's disability benefits were continued until the end of the relevant notice period.

[4] To obtain the benefit of the offer, Eric Rubin was required to sign the release.

[5] Eric Rubin executed the release during the meeting. It was submitted that he did this because he believed the offer he received from Home Depot was all that he was entitled to. The termination came as a surprise. Eric Rubin was not thinking clearly and did not think he had any option. At the time he signed the release, he was unaware of his common law rights or his statutory rights, under the *Employment Standards Act, 2000.* Shortly after the meeting, Eric Rubin came to realize that he had made a mistake by signing the release. He immediately contacted his accountant and his family lawyer. Eric Rubin was referred to his present counsel. On Friday, August 5, 2011, counsel sent a demand letter to Home Depot challenging the enforceability of the release and asking to negotiate a proper severance package.

[6] For its part, Home Depot stands by the release and the offer it accepted. Home Depot makes clear that Eric Rubin was, in no way, pressured to make a decision at the meeting on July 28, 2011. The letter afforded him one week to consider the offer. Eric Rubin took the time to carefully read the letter before he signed. He asked about his options regarding the possibility of apportioning funds towards his RRSP. At the conclusion of the meeting, Eric Rubin was invited to contact the "District Talent Manager" of Home Depot. He took up the suggestion and telephoned her, after the meeting, during the afternoon of July 28, 2011. They did not speak until the following day. It would seem that, during the course of the telephone conversation, Eric Rubin voiced no dissatisfaction and raised no concerns with respect to the release that he had signed the day before.

[7] The release required that $1,540.89 of the lump sum payment be directed to the RRSP of Eric Rubin. This payment was not made. It was not until the exchange of the material leading to this motion that Home Depot became aware of this error. On behalf of Home Depot, this was described as an oversight. The payment has now been made.

The Motion

[8] The motion is for summary judgment.

[9] In considering such a motion, the judge is required to ask whether the full appreciation of the evidence and issues required to make dispositive findings can be achieved on a motion for summary judgment. If not, the matter should be left to proceed to trial where, in the normal course, this full appreciation can be developed (see: *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (CanLII), at para. 50). In this case, neither party has suggested that the required full appreciation cannot be achieved on the motion. As I have already noted, the plaintiff seeks a finding setting aside the release, a determination of the appropriate notice period and of the damages to be awarded. For its part, the defendant submitted that the release be left to stand. It asks for summary judgment dismissing the action. If the release is to be left in place, like the plaintiff, the defendant asks that the notice period be assessed. In the circumstances, I have treated this motion as one where the parties have agreed to submit their dispute to resolution by way of summary judgment (see: *Combined Air Mechanical Services Inc. v. Flesch*, *supra*, at para. 72). I do this understanding that it does not relieve me of the responsibility to ensure that I can have, and do have, the familiarity with "...the total body of evidence in the motion record..." required to decide the matter (see: *Combined Air Mechanical Services Inc. v. Flesch, supra,* at para. 53).

Legal Context

[10] In *Brito v. Canac Kitchens*, [2011] O.J. No. 1117, 87 C.C.E.L. (3d) 184 (appeal allowed only in respect of punitive damages, [2012] O.J. No. 376), Mr. Justice Echlin began his judgment with the observation that employment law in Canada has changed:

> Although it did not occur overnight, the 20th Century witnessed significant changes in the way in which workers were treated. It may now be fairly and generally asserted that today, in the absence of a voluntary resignation, or misconduct on the part of the employee, Canadian employers must dismiss their employees with proper notice or pay in lieu thereof.

[11] *Brito* considered the case of a long-service employee, who had been dismissed without cause, and provided only with his statutory entitlements, pursuant to the *Employment Standards Act, 2000*. During the reasonable notice period to which the employee was entitled, he was diagnosed with cancer and became totally disabled. He did not have STD or LTD because they had been cancelled by the employer at the conclusion of the statutory notice period. Mr. Justice Echlin determined that the employer was responsible to pay the benefits as if the coverage had not been cancelled.

[12] The issue with the case I am asked to decide is whether the change to which Mr. Justice Echlin referred can extend to circumstances where the employee has accepted an offer and signed the release. The law pertaining to the enforceability of the release executed in the context of the dismissal of an employee was set out by the Court of Appeal, in *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573. In that case, the plaintiff, the employee Titus, worked as in-

house counsel for the defendant, employer. It was the third time that the plaintiff had been engaged, in this capacity, by the defendant. After eighteen months, he was fired. The employer offered a settlement package, provided that the employee signed a release. Titus accepted the offer and signed the release. He obtained new but less-remunerative employment within two weeks. He brought an action against the employer claiming that the settlement and release were unconscionable. The trial judge found in favour of the employee. The Court of Appeal set aside that judgment. The trial judge had failed to consider the law applicable to unconscionability. The Court of Appeal referred to and relied on *Cain v. Clarica Life Insurance Co.* (2005), 263 D.L.R. (4th) 368, at para. 32, in identifying the four elements which are necessary to demonstrate that a release is unconscionable:

> 1. a grossly unfair and improvident transaction;
>
> 2. victim's lack of independent legal advice or other suitable advice; and
>
> 3. overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or other disability; and
>
> 4. other party's [sic] knowingly taking advantage of this vulnerability.
>
> (*Titus v. William F. Cooke Enterprises Inc., supra,* at para. 38)

[13] Can Eric Rubin bring himself within each of these four elements?

1. *Was the transaction grossly unfair and improvident?*

[14] It is said that this transaction was grossly unfair because the payment offered, while said in the letter of termination to exceed the obligations of the company, represented only one or two days more pay than the statutory requirement. (The offer was for 28 weeks; the *Employment Standards Act, 2000* required 27 ¾ weeks.) It was submitted that the benefits provided left Eric Rubin in a worse position than had he refused to sign the release. This idea is based on the fact situation as it developed in *Brito v. Canac Kitchens, supra.* In that case, the benefits were terminated at the conclusion of the period imposed by the *Employment Standards Act* (eight weeks). It was only after that the employee became incapacitated. As a result of the determination of the judge that a longer period of notice was called for, the liability of the employer to provide the benefits was extended and a finding in favour of the employee made. As counsel for Eric Rubin sees it, his client was in a worse position than he would have been if he had not signed the release. If the same misfortune had befallen him, as occurred in *Brito*, he would have had no recourse, given the presence of the release.

[15] In my view, these arguments do little assist the Eric Rubin. The question is not how much more than the statutory value the offer represents but whether, in the circumstances, it is so unreasonable as to be grossly unfair. This comes from the measure of the situation as a whole. In *Titus*, the offer that was accepted included a payment that represented three month's salary in

lieu of notice. The trial judge concluded that the appropriate notice period was ten months. The Court of Appeal held that the fact of the latter does not make the former grossly unfair. It observed that there were other factors involved. In that case: "if the respondent accepted the offer, he would receive the money immediately, he would have an opportunity to mitigate his damages by seeking new employment (in fact, the respondent obtained a new position within two weeks of his termination) and, importantly, he would avoid the delay, costs and uncertainty of litigation" (see: *Titus v. William F. Cooke Enterprises Inc., supra,* at para. 41). It should be said that not all of these considerations apply in the present case. Any payment required to be made, pursuant to the *Employment Standards Act, 2000*, is made upon termination regardless of whether a release is signed or the employee determines to proceed to exercise his or her common law rights.

[16] Insofar as the value of the benefits is concerned, it may be that had Eric Rubin become ill more than eight weeks after his termination, the signing of the release would have foreclosed any claim he might have made, but this is the sort of calculation made in any settlement. One may do better to wait, but there can be advantages in accepting the payment offered even with the incumbent risk. The fact remains that, in *Brito*, the employee had not signed a release.

[17] To my mind, the question is simpler than the submissions made on behalf of Eric Rubin suggest. Eric Rubin spent his entire working life in the business of retail hardware. He was employed by Home Depot and its predecessor for nineteen years and eight months (December 2, 1991 to July 28, 2011). From about October 22, 1994 to the day of his termination, he worked, full-time, as a Competitive Price Shopper. In this role, it was his responsibility to visit the stores of competitors to compare prices. He would then prepare reports for management based on the information he had collected. Nothing much was said about this in the material that was filed, but it stands to reason that, while this job would not entail specialized skill or training, the employer would benefit from Eric Rubin's many years of experience in the industry and in the position. The explanation given for his termination was an "organizational change" being undertaken by the company. Whatever this may mean, it makes clear that Eric Rubin was not being terminated for cause and there was no evidence to suggest that this was brought on by any economic concerns within the employer. Finally, I observe that, on the day he was fired, Eric Rubin was sixty-three years old. It must have been obvious that, given his age and the narrowness of his experience, that he could have difficulty finding new employment. The question is whether, in the circumstances, the notice provided is grossly inadequate; that is to say, in the circumstances, would this award be sufficiently divergent from community standards that it ought to be set aside? I find that it is. The idea that, in the modern day, a twenty-year employee, moving to the end of his expected working life, who is fired without cause, for reasons reflected in an internal re-organization of the company, would receive only six months' notice, is far removed from what the community would accept.

[18] It is not clear to me that the community response to this factor can be understood definitively, independent of the other three considerations referred to in *Titus v. William F. Cooke Enterprises Inc., supra*. Certainly, it is easier to make the determination bearing those factors in mind. A consideration of them serves only to underscore the conclusion.

2. *Victim's lack of independent legal advice or other suitable advice*

[19] The importance of obtaining legal advice was addressed in *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986, at para. 32, where the Court pointed out that many employees are simply unaware of their legal rights:

> …the fact that many individual employees may be a unaware of their statutory and common law rights in the employment context is of fundamental importance. As B. Etherington suggests in 'The Enforcement of Harsh Termination Provisions in Personal Employment Contracts: The Rebirth of Freedom of Contract in Ontario' (1990), 35 McGill L.J. 459, at p. 468, 'the majority of unorganized employees would not even expect reasonable notice prior to dismissal and many would be surprised to learn they're not employed at the employer's discretion.

[20] The affidavit of Stephen Fraser, among other things, indicates that, after reading the letter of termination, Eric Rubin commented that "he was happy that his benefits would be continued by Home Depot." This understanding was not correct. The termination letter is, at best, ambiguous. It does say: "In no case will your benefits be discontinued prior to the end of the statutory notice period." However, this sentence is followed immediately by: "So there is no misunderstanding all other benefits and insurance coverage ceases on your last day of employment". For these statements to be read consistently, it must be that the first sentence refers to the listed benefits and the second to benefits the letter does not refer to. This being so, AD&D coverage was withdrawn. As counsel for Eric Rubin understands this, it was only re-instated after the demand letter of August 5, 2011 had been delivered. There is no suggestion that Stephen Fraser, upon hearing the comment of Eric Rubin, made any attempt to explain the situation or, alternatively, if Stephen Fraser was unclear as to what was intended, to inquire, within Home Depot, as to meaning of the letter.

[21] Prior to signing the release, Eric Rubin did not have any legal or other advice. It is true that the letter or termination did state that the release was to be signed within a week of the meeting, meaning that it was open to Eric Rubin to take the offer with him and seek that advice. The affidavit of Stephen Fraser does nothing more than point out that the termination letter does contain this proviso. The affidavit recounts that Eric Rubin read the termination letter and the release. He asked about his options regarding the possibility of apportioning funds towards his RRSP. Stephen Fraser recounts that, in response, he reiterated what was in the letter and release and that "... Mr. Rubin had two options: he could either accept the package as it was, or direct a portion of the settlement monies towards his RRSP's". There is no suggestion that Eric Rubin was advised he could take a week to think about, or obtain advice, as to which option he wished to select. More importantly, in indicating that the release need not be signed until August 4, 2011, the letter attached the execution of the release to the payment of the money. It said:

> The payment will be made to you by a lump sum (less statutory deductions) provided you sign the release below by August 4, 2011.

[22] This says that, before he was paid, Eric Rubin would have to sign the release. This puts the August 4, 2011 date in a different context. If he delayed signing, the receipt of these funds by Eric Rubin would be, similarly, delayed. If he did not sign by August 4, 2011, the implication is that he would not be paid at all. This was, at best, misleading. The payments required by the *Employment Standards Act 2000*, including the 27 3/4weeks salary, would have to be paid regardless of whether any release was ever signed.

[23] If Eric Rubin had obtained legal advice, doubtless this would have been explained to him. As it was, he did not. As it is, Home Depot took advantage of that situation.

3. *Overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or other disability*

[24] In *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326 (C.A.), Lord Denning addressed the general principles relating to unconscionability and said, in part:

> Gathering altogether, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, entered into a contract upon terms which are very unfair or transfers property for consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.
>
> (*Lloyds Bank Ltd. v. Bundy, supra*, at p. 339, as quoted in *Waterman v. Frisby Tire Co. (1974) Ltd.*, [1995] O.J. No. 1877, 13 C.C.E.L. (2d) 184, at para. 63)

[25] The imbalance in bargaining power between an employer and employee is inherent in the relationship:

> [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination.
>
> (P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 18, as quoted in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1051-52 (Dickson C.J.) and repeated in *Wallace v. United Grain Growers Ltd., supra*, at para. 92)

[26] "The unequal balance of power led the majority of the Court in *Slaight Communications, supra*, to describe employees as a vulnerable group in society (see p. 1051). The vulnerability of employees is underscored by the level of importance which our society attaches to

employment"... "Thus, for most people, work is one of the defining features of their lives. Accordingly any change in a person's employment status is bound to have far-reaching repercussions." ... "The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection (see: *Wallace v. United Grain Growers Ltd., supra,* at paras. 93, 94 and 95).

[27] The imbalance is intrinsic to the termination of an employee:

> There is an inherent imbalance in bargaining power between an employer and an employee when the former terminates the employment of the latter. The employer's business will continue, the employer will be there, and the employee will be gone.
>
> (*Titus v. William F. Cooke Enterprises Inc., supra,* at para. 46)

[28] The impact of the imbalance of power is demonstrated by the response of Eric Rubin to the situation he confronted upon being handed the letter of termination and being told: "Eric, this is your last day". In his affidavit, Eric Rubin deposed:

> I was completely caught off guard when Mr. Fraser informed me that Home Depot was terminating my employment. I had worked for Home Depot for almost 20 years. Prior to joining Home Depot I had only worked at two companies in my life and there had not been a single day when I did not have a job. I had never been unemployed before. When Mr. Fraser told me I was losing my job I felt like I had just been hit by a truck. My mind started spinning and my heart began to race.

[29] The fact that, as Stephen Fraser saw it, Eric Rubin took his time to read the termination letter and release, commented that he was happy that his benefits were being continued and had the composure to ask about his options in respect of his RRSP, does not detract from the power imbalance between the employee and the representative of the employer. The observations, made by Stephen Fraser, that Eric Rubin appeared cordial throughout the meeting and that his demeanour was not one of a person in shock cannot be interpreted to indicate the power imbalance did not exist. People respond to stress differently. To my mind, Eric Rubin should be in no different position because he chose not to show his concern, confusion or surprise. It is the situation and the nature of the relationship which speaks to the power imbalance, not the personality of the person whose life is being changed.

[30] In *Titus v. William F. Cooke Enterprises Inc., supra,* the Court of Appeal acknowledged that the "…generalized vulnerability of all terminated employees…" is not the only consideration in examining the power imbalance. In that case, it was argued that this "starting point of vulnerability at the moment of termination" was magnified by the recent death of the father of the employee and his high debt load. The Court found that "…these aspects of general and specific vulnerability…" did not create "an overwhelming imbalance in bargaining power in

this case". In fact, the "generalized vulnerability" was "diminished in this case by the fact that the respondent was a senior, knowledgeable lawyer particularly well-versed in contract and employment law, including the law relating to wrongful dismissal" (see: *Titus v. William F. Cooke Enterprises Inc., supra,* at paras. 47-50).

[31] In this case, the power imbalance was quite different. Eric Rubin was not a high-level employee with professional training. Those mitigating factors did not exist. The power imbalance was enhanced by the way in which the representatives of Home Depot dealt with the situation. In *Titus*, the employer told the employee to take the time he needed to deal with the situation (see: *Titus v. William F. Cooke Enterprises Inc., supra,* at para. 50). No such advice was provided to Eric Rubin. Providing a letter which is, at best, ambiguous and misleading, as well as beginning the substantive part of the conversation with the advice to the employee that this is your last day, exacerbated rather than remediated the problem.

4. *Other party knowingly taking advantage of this vulnerability*

[32] It is impossible to look into the minds of the various officials responsible for the acts of Home Depot to find proof that they set out to take advantage of the vulnerability of Eric Rubin. But it can be implied from their actions and approach to the termination. There was no negotiation or discussion as to how best to deal with the fact that a decision had been made to let Eric Rubin go. He was presented with a response to this decision that was prepared by, and shaped to respond to, the needs of the company. The offer was presented in a way that was directed to getting it signed. Eric Rubin was not presented with a choice calling on him to decide whether or not to accept the offer. The letter advised him that he was already being offered more than he was entitled to. The proposition was that, if he did not sign, he would not be paid. The letter did not say that the offer represented less than two days' more pay than he was entitled to be paid whether or not he signed. There was no suggestion that he had common law rights that extended beyond the *Employment Standards Act, 2000* to which the letter referred. Not only did the letter explain there were benefits that were being terminated immediately, but it also advised Eric Rubin that he should replace those benefits as they lapsed. While, at first, this seems like well-intentioned advice, it also makes clear that Eric Rubin had new responsibilities that he would have to pay for. Where would the money come from to do this; presumably, from the money received once the offer was accepted. It might be easier to accept this advice if the letter did not suggest that, among the benefits to be replaced, were some (particularly AD&D) that Eric Rubin was entitled to receive from Home Depot. The only practical choice that Eric Rubin was offered was whether he wished to direct any of the money he was to receive to his RRSP. Counsel for Eric Rubin referred to this approach as "presumptive selling". There is a question that is asked, but the question presumes that the buyer, in this case Eric Rubin, has made a decision to accept the offer. The presence of "presumptive selling" is confirmed by a second reference to the August 4, 2011 deadline found in the termination letter. At the end of the description of what was being offered, the letter directs: "Check appropriate box below and return by August 4, 2011". The letter presumes the release will be signed. No other option is

offered. This approach, taken as a whole, is set to take advantage of the vulnerability of the employee. I find this was arranged in the expectation that it would direct, if not compel, Eric Rubin to sign the release.

[33] I find that this release should be struck and found to be unenforceable. I say this mindful of the policy considerations in favour of upholding releases. This is not the same as settlement at the courtroom door (see: *Barr v. Pennzoil-Quaker State Canada Inc.*, [2007] O.J. 2859, 59 C.C.E.L. (3d) 89, at para. 54). That will occur after all the steps in the process leading to trial are complete and after both sides have had considerable opportunity to consider their positions. This happened when one of the parties had no knowledge of what was about to transpire. No negotiation was offered. Stephen Fraser gave the termination letter to Eric Rubin and said: "Eric this is your last day, the company is going in a different direction. *This is the package the company is giving you*". [Emphasis added]. Eric Rubin did not agree to anything. He simply accepted what he was misled into thinking was his only option.

[34] This is not the only circumstance where the law allows for consideration of an imbalance of power where a contract was, seemingly, agreed to. If a term of a contract is ambiguous, it is to be interpreted against the interest of the person who insisted it be included ("*contra proferentem*" which means "against the offeror"). The *Consumer Protection Act, 2002* S.O. Ch. 30, Sch. A provides four circumstances where various agreements can be terminated "without any reason …within 10 days after receiving the written copy of the agreement" (ss. 28(1), 43(1) and 51(1)) or "without any reason… within 10 days after the later of receiving the written copy of the agreement and the day all the services are available" (s. 35(1)).

[35] These reasons should not be taken, in any way, to detract from the right of parties to contract and be bound by their agreements. It simply confirms that employers cannot use their superior position to mislead an employee into an agreement that is unconscionable. It does nothing more than confirm the observation of Mr. Justice Echlin that Canadian employers must dismiss their employees with proper notice or pay in lieu thereof.

Reasonable Notice

[36] Having set aside the release, I am left to determine what, in the case of Eric Rubin, would have been a reasonable notice period.

[37] Counsel, on behalf of Eric Rubin, submitted that the appropriate notice period should be twenty months. He referred to cases that he says support that proposition (see: *Turner v. Inndirect Enterprises Inc.*, [2009] O.J. No. 6245 (S.C.J.); *Cardenas v. Canac Kitchens*, [2009] O.J. No. 1570 (S.C.J.); and, *Cohen v. Edwards*, [2000] O.J. No. 2380 (S.C.J.)).

[38] Counsel, on behalf of Home Depot, submitted that the appropriate notice period should fall within the range of seven to ten months. He referred to cases that he says support that proposition (see: *Jordison v. Caledonia Curling Co-operative Ltd.* 2000 SKQB 55; *Ellsworth v.*

Murray Canada Inc., [1997] O.J. No. 5088 (ON CJ); and, *Fisher v. Lakeland Mills Ltd.* 2008 BCCA 42).

[39] While these cases provide guidance, in the end, each case must be decided with reference to its particular facts:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.
>
> (*Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.), at para. 21, as quoted in *Honda Canada Inc.v. Keays,* 2008 S.C.C. at paras. 28 and 29)

[40] In this case, the following factors should be accounted for:

(a) Eric Rubin's role and responsibilities as a competitive shopper;

(b) Eric Rubin's nineteen years and eight months of continuous service;

(c) Eric Rubin's age of sixty-three years; and,

(d) the difficulty Eric Rubin will, and has, experienced finding alternative employment.

[41] Eric Rubin has worked for this employer for a considerable period of time. On the other hand, the job did not include any supervisory of management responsibilities. Eric Rubin may continue to have difficulty finding further employment, but he does have knowledge that could be of benefit to a range of employers in the retail hardware business and, at sixty-three years of age, he is arriving at a time when the working life of many Canadians comes to an end.

[42] In the circumstances, I find that a reasonable period of notice would be twelve months. This, of course, includes both salary and other benefits. I assume that the parties will be able to work out the value of this award. It is to include pre-and post-judgment interest, as provided for in the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended. If not, I may be spoken to.

Costs

[43] No submissions were made as to costs. If the parties are unable to agree, I will consider written submissions on the following terms:

- on behalf of the plaintiff, no later than fifteen days after the release of these reasons. Such submissions are to be no longer than four pages,

double-spaced, exclusive of any Bill of Costs, Costs Outline or case law that may be filed;

- on behalf of the defendant, no later than ten days thereafter. Such submissions are to be no longer than four pages, double-spaced, exclusive of any Bill of Costs, Costs Outline or case law that may be filed; and,

- on behalf of the plaintiff, in reply, no later than five days thereafter. Such submissions are to be no longer than two pages, double-spaced.

LEDERER J.

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BETWEEN:

ERIC RUBIN

Plaintiff
(Moving Party)

– and –

HOME DEPOT CANADA INC.

Defendant
(Responding Party)

JUDGMENT

LEDERER J.

Released: 20120525