The employee's previous experience: How it affects notice of termination

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In recent years, many companies have experienced a shortage of skilled manpower. This situation often results in the need to intensify recruitment and the retention of job placement agencies or head-hunters in order to find the best candidates. However, employers must be aware that this method of recruiting candidates can have consequences on the length of notice that must be provided in the event of a termination of employment without a serious reason.

Article 2091 of the *Civil Code of Québec* (the "C.C.Q.") entitles either party to terminate a contract of employment of indeterminate term without a serious reason, subject to the obligation to provide reasonable notice of termination or an indemnity in lieu thereof.

Pursuant to the second paragraph of Article 2091 C.C.Q., the notice of termination must be reasonable and must take into account, in particular, the nature of the employment, the special circumstances in which it is carried out and the duration of employment. In addition to these factors, other criteria recognized by case law must be considered, such as the intention of the parties at the time of hiring, the adverse conditions of the labour market, the employer's good faith, the employee's age, education, training, difficulty in finding comparable employment, his or her family responsibilities, medical condition as well as other special circumstances such as the fact that the employee was solicited away from a stable employment to join the company.

It is clear from the case law that the assessment of what constitutes reasonable notice of termination remains a question of fact. Two decisions rendered recently by the Superior Court remind us that precedents serve only as a guide and, depending on the circumstances, a specific factor may or may not have an impact on the calculation of the notice of termination.

In *Spiering c. Novartis Pharma Canada Inc.*[i], the Superior Court found that the years of service accumulated by an employee in her previous employment had to be taken into account in determining the length of reasonable notice of termination. The 50-year-old employee had been approached by a head-hunting firm while she held the position of sales manager for the pharmaceutical company Pzifer. Novartis Pharma Canada Inc. ("Novartis") retained the services of a head-hunting firm to find a qualified person to fill the position of Sales Vice-President. The firm contacted the employee and urged her to submit her curriculum vitae. Further to a meeting with Novartis' senior executives, an initial offer of employment was made to the employee. This offer included a base salary of $175,000 per year, a signing bonus of $25,000, as well as stock options that could be exercised in three years. The employee turned down this initial offer. Novartis then came back with a better offer, thus convincing the employee to quit her job and join the Novartis team. Twelve months after she was hired, Novartis terminated her employment and gave

her pay in lieu of notice corresponding to nine months of wages, in accordance with the provisions of her contract of employment.

At the onset, the Court reiterated that Article 2091 C.C.Q. is a public order provision. Consequently, the employer cannot rely on a clause in an agreement that pre-determines a notice of termination, if the indemnity that is provided in the contract is unreasonable. Moreover, on the basis of the comments made by the Supreme Court in *Wallace v. United Grain Growers Ltd.*[ii], the Court ruled that the years of service accumulated with another employer must be considered where the employer induced the employee to "quit a secure, well-paying job . on the strength of promises of career advancement and greater responsibility, security and compensation with the new organization"[iii]. In the case at hand, even though the approach was made in good faith and without any misrepresentation, the Court was of the opinion that Novartis had expended considerable efforts to entice the employee to quit her job. Consequently, the Court decided to take into account her 18 years of service with her former employer as well as the benefits the employee lost when she left to join Novartis. The nine-month notice of termination was, thus, increased to 16 months.

On the other hand, one week later, in *Armstrong c. Wesco Distribution - Canada Inc.*[iv], the Superior Court dismissed an employee's motion requesting a notice of termination equal to 18 months of salary, where his employer had deemed it reasonable to pay him six weeks salary given his 23 months of service. The employee was a sales representative, specializing in the wholesale distribution of electrical products. Before being hired by Wesco Distribution - Canada Inc. ("Wesco"), he had worked approximately 18 years for four different companies, namely as a clerk, salesman or representative. However, at the time the employee received Wesco's offer, he was unemployed. Under these circumstances, the Court refused to take the employee's previous years of service into account in calculating the reasonable notice of termination. The Court stated that taking the employee's previous experience into account instead of the length of his service at Wesco would be double counting:

The distinction between these two cases is based on the employee's employment situation at the time of hire: in Spiering, the employer retained the services of a specialized firm, which tenaciously solicited a person who held a secure, paying job with a competitor, whereas in Armstrong, the employer made an offer to someone who was, at the time, unemployed.

These cases confirm that the circumstances surrounding an employee's hiring could have a significant impact on the calculation of the length of reasonable notice on termination. The steps taken by an employer to recruit employees working in competing companies and any promise of career advancement, job security or increased remuneration may warrant a substantial increase in the length of notice, regardless of whether the employee worked for the employer for a few months or several years. However, the fact that an employee was solicited away from stable employment will have a greater impact in assessing the length of notice if the employee is dismissed shortly after being hired. While still relevant, this factor will have a lesser impact if the dismissal occurs several years after the employee was recruited, in the absence of other promises made by the employer at the time of hiring.

When all is said and done, even though some decisions recognize the employee's responsibility to assume the risk of leaving his or her stable employment[vi], employers have, in our opinion, every interest to exercise care when recruiting and making promises, in order to avoid onerous termination obligations in the event of untimely dismissal.

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i Spiering vs. Novartis Pharma Canada Inc., 2008, QCCS, 1051, March 20, 2008.
ii [1997] 3 S.C.R. 701.
iii Spiering, par. 55.
iv 2008, QCCS, 1128, March 26, 2008.
v Ibid., par. 70.
vi Patenaude vs. Prudel Inc. [1993] R.J.Q. 1205 (S.C.)., Poirier vs. Centre de Placements financiers Everest Inc., D.T.E. 2005-199 (S.C.) and Pilon vs. Atlas Télécom mobile Inc., [2007] R.J.D.T. 950 (S.C.).