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Can employment lawyers seek notice periods in excess of what was pleaded? (*Lynch v. Avaya Canada Corp.*)

By Noah Bonis Charancle

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Noah Bonis Charancle
Student-At-Law
416.865.6661
nbonischarancle@grllp.com

Can Courts award larger notice periods than what was originally requested in the pleadings? The Court of Appeal for Ontario's decision in [Lynch v. Avaya Canada Corp., 2023 ONCA 696 \(CanLII\)](#) ("*Lynch*") suggests that they can.

The general rule in Ontario is that plaintiffs are limited to recovering the relief that they have actually requested in their pleadings. This requirement ensures that the defendants to an action are aware of the case that they need to meet and that they can tailor their responses accordingly. After starting an action, if a plaintiff wants to change any aspect of their pleading, they must amend it via a formal process which requires either obtaining the consent of all the other parties involved in the action or seeking leave of the Court to do so. A amended pleading must be re-served.

In [Lynch](#), the plaintiff, a professional engineer, was terminated after 29 years of service with successor companies. The plaintiff sued his former employer for wrongful termination and sought damages equal to 26 months' notice in his statement of claim.

Ultimately, the plaintiff moved for summary judgment on his claim. However at the hearing of the summary judgment motion, the plaintiff's counsel, without having amended the statement of claim, sought 36 months' notice for his client instead of the 26 months originally pleaded.

In her decision, the motion judge awarded the plaintiff 30 months of notice, or four months' notice above what was actually requested in the statement of claim.

The employer appealed the motion judge's decision on the grounds that she erred in awarding a notice period that exceeded the relief sought in the plaintiff's pleading.

The Court of Appeal for Ontario held that there was no merit to the employer's appeal.

Among other things, at [paragraph 6](#) of its decision, the appellate Court concluded that the employer had conceded that it suffered no prejudice as a result of the plaintiff's desire to obtain more than 26 months' notice. As well, the appellate

Court recognized that if the plaintiff had sought to amend his claim, the motion judge would probably have permitted the amendment. Lastly, the appellate Court noted that the employer acknowledged in its factum that at the hearing of the summary judgment motion, the plaintiff sought an award of damages based on 36 months' notice and that the "motion was argued on that basis."

Although one can expect damages to reflect what parties actually request in their pleadings, the motion judge's flexibility to make an award that exceeded the amount of notice sought in the plaintiff's statement of claim in this case and the appellate Court's dismissal of the employer's appeal opens the door for employment lawyers to request increased damages once they find themselves in Court.

On a summary judgment motion, where a lawyer formally seeks leave to amend the pleading to recover increased damages or more notice in an employment case, they will be required to show that the employer will suffer no prejudice from such a request.

However, the failure to seek an amendment to the statement of claim will not be fatal to the motion judge's ability to make a higher award, particularly if, on an appeal, the plaintiff can convince the appellate court that an amendment of the plaintiff's pleading would likely have been granted in any event if it had been requested.

This decision is also interesting because the plaintiff was awarded 30 months' notice in arguably non-exceptional circumstances. In [Lowndes v. Summit Ford Sales Ltd., 2006 CanLII 14 \(ON CA\)](#), the Court of Appeal for Ontario previously held that notice periods exceeding 24 months generally require exceptional circumstances. More specifically, the

Court in that case stated at [paragraph 11](#):

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

In [Lynch](#), the motion judge found that the factors which warranted a larger notice period were:

- a) lack of comparable employment in Belleville, the area of Ontario where the plaintiff resided;
- b) the plaintiff's limited expertise and skills to internal and unique software; and
- c) the fact that the plaintiff had developed one or two patents yearly for his previous employer.

Most, if not all of these factors, could arguably apply to any employee who spent over three decades with the same employer. Accordingly, this decision seems to potentially lower the bar for long-term or small labour-market employees to obtain notice periods in excess of 24 months' notice.

However, it remains to be seen whether this decision will see a trend toward courts granting notice periods in excess of the presumptive ceiling of 24 months' notice that generally apply in wrongful dismissal cases.

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