

Case In Point

Court of Appeal Considers Continuity of Employment Where Employer Purchased Some Assets of Former Employer

Date: November 27, 2017

In [*Krishnamoorthy v. Olympus Canada Inc.*](#), the Ontario Court of Appeal recently considered the issue of continuity of an employee's employment following the sale of a business, and in particular, where the sale of business involves the acquisition of only some of the vendor company's assets.

The plaintiff, Krishnamoorthy, became employed with Carsen Group in 2000. Carsen was the exclusive distributor of Olympus America's products in Canada. In 2005, Olympus America ended its distribution agreement with Carsen. Some of Carsen's employees were offered termination packages, while the majority of employees were offered employment with Olympus Canada, which had acquired some but not all of Carsen's assets.

In late 2005, the plaintiff signed an employment agreement with Olympus Canada. The agreement provided that (1) he would be treated as a new employee, (2) there would be no recognition of prior service, and (3) he would release Olympus from any prior employee claims.

The employment agreement also provided that on termination without cause, the plaintiff would be entitled to the greater of notice or pay in lieu and severance pay under the *Employment Standards Act, 2000* (ESA) or four weeks' pay per year of service with Olympus or Carsen, to a maximum of 10 months. Notably, the plaintiff was not provided with a bonus or additional compensation or severance payments upon signing the new employment agreement.

In 2015, Olympus Canada terminated the plaintiff's employment without cause. The plaintiff brought a summary judgment motion claiming that his employment with Olympus was continued employed from Carsen, and that he was provided with no fresh consideration when signing the Olympus agreement. On summary judgment, the motion judge accepted the plaintiff's position.

The Court of Appeal disagreed and ordered that the action proceed to trial.

Regarding the issue of consideration, the Court found the plaintiff was provided with a new employment contract by Olympus, which was itself consideration for the termination clause.

The Court also considered section 9(1) of the ESA, which states:

If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment. [...]

The Court held that the ESA does not deem the employment contract between an employee and an employer to bind a subsequent purchaser of some of that employer's assets. On that basis, the Court found that Olympus Canada was a new employer.

In addition, section 9(1) of the ESA does not require the purchaser of a business' assets to offer employment to employees of that business on the same terms as their original contracts. Accordingly, Olympus was not required to offer the plaintiff employment based on the same terms of employment that previously applied with Carsen.

This case has important implications for companies involved in the sale of a business. While each case is fact specific, section 9(1) of the ESA may not become engaged where a company purchases some of the assets of another company, meaning that continuous employment will not result.