

Case In Point

Appellate Court Considers Employment Issues Arising out of a Termination Post-Sale of Business

Date: February 1, 2019

In [*Kerzner v American Iron and Metal Company Inc.*](#), the Ontario Court of Appeal considered a number of complex issues arising out of a sale of business and successive employment contracts entered into after that sale. The Court provided guidance on what can and cannot be agreed to during those transitions and how releases should be structured if they are to remain enforceable.

In 1980, the Plaintiff was hired by a company called Bakermet Inc. (Bakermet). In 2008, ArcelorMittal Ottawa (Arcelor) acquired Bakermet by acquiring its shares through a Share Purchase Agreement (SPA). The SPA included a provision releasing Bakermet and its successors from any claims the Plaintiff had in connection to his employment with Bakermet pre-2008 (Release).

At the same time, the Plaintiff signed an employment agreement with Arcelor (2008 Contract). The 2008 Contract was for an indefinite duration, but for a minimum of at least three years. If his employment was terminated without notice, the Plaintiff would be entitled to 12 months' notice, inclusive of entitlements under the *Employment Standards Act, 2000* (ESA). The Plaintiff agreed to stay on as the general manager of the business formerly run by Bakermet. He also agreed to certain non-competition and non-solicitation clauses.

While working with Arcelor, the Plaintiff entered into two employment contracts with Arcelor. In 2011, the Plaintiff entered into a three-year fixed-term contract that limited the notice period to six months (2011 Contract). In 2014, the Plaintiff entered into a two-year fixed-term contract that kept the notice period at six months but also required Arcelor to give at least three months of notice if it intended not to renew (2014 Contract). The 2011 Contract and the 2014 Contract also added further conditions to the restrictive covenants.

In 2015, the Defendant acquired former Bakermet assets from Arcelor. The Defendant then dismissed the Plaintiff with one week of working notice and six months of pay in lieu of notice, pursuant to the 2014 Contract. The Plaintiff brought an action for wrongful dismissal, claiming 24 to 30 months' notice based on his 35 years of continuous service with Bakermet, then Arcelor and then the Defendant.

The Plaintiff purchased and became the president of the Defendant's competitor two months after he was dismissed. The Defendant counterclaimed for breach of fiduciary duty and breach of the

restrictive covenants in the 2014 Contract.

The motion judge upheld the Release and awarded the six months' pay in the contract. The judge dismissed the Defendant's counterclaims, finding that the duration and geographic scope of the covenants were unreasonable. Both parties appealed. The Court of Appeal considered the following issues:

The Effect of the Release and the Termination Clause

The Court disagreed that the Release waived the Plaintiff's pre-2008 employment for the purposes of calculating ESA entitlements. By purporting to do so, the Release violated the ESA: it tried to contract out of section 9(1), which states that an employee's length of service will include the employment before the sale of the business. As a result, the termination provision in the 2014 Contract was void because it only provided for six months' notice, which was less than the 34 weeks of pay to which he was entitled for his 35 years of service under the ESA (8 weeks' notice and 26 weeks' severance).

Was there an Indefinite Contract?

Having voided the termination clause, the common law applied. The Court disagreed that the Plaintiff was employed on a fixed-term contract. Even though the Plaintiff waived his right to claims arising from his pre-2008 employment, "his prior employment remained a fact and formed part of the context for the subsequent agreements governing his continued employment." Even if there were numerous contracts, the fact that the Plaintiff's employment started in 1980 was a stand-alone fact. The Court found the motion judge erroneously focused on the transitions between employers and failed "to recognize the indefinite nature" of the employment. The Court also noted that the 2008 Contract stated it was for an "indefinite period of time unless terminated" and that the 2011 and 2014 Contracts stated that they would automatically renew unless notice was given by the employer, suggesting that the employment was indeterminate.

At the same time, the Release waived the Plaintiff's claim to common law notice for the pre-2008 service. Accordingly, the length of service for common law purposes was continuous employment from 2008 to 2015. The Court determined that seven months' notice was reasonable. But because the Plaintiff mitigated and the ESA minimum was greater, he was only entitled to the statutory minimum of 34 weeks.

Did the Restrictive Covenants Apply?

The Court dismissed the Defendant's counterclaim. The non-competition clause was unenforceable. When the Plaintiff had signed the 2008 Contract, he had been an owner of a business and therefore a less stringent standard applied to the covenant's reasonableness. When the covenant was altered in the subsequent contracts, the Plaintiff was an employee, and so it

“should be subject to the more onerous employer/employee test.” On that test, the non-competition clause was unreasonable because it prevented the Plaintiff from working in the only industry he had ever worked, almost entirely, and in operations he was never involved with. The geographic scope was also unreasonable because it included regions in which he never did business.

The non-solicitation counterclaim was also dismissed. There was no evidence that the Plaintiff had violated that covenant by purchasing a competing business and serving as its president. He had not contacted any of the Defendant’s customers in doing so.

Was there a Breach of Fiduciary Duty?

Due to lack of evidence, the Court dismissed the Defendant’s argument that the Plaintiff breached his fiduciary duties.

Conclusion

Kerzner is a complex case, but because of that it provides guidance on how to navigate employment obligations when buying a business. It reminds employers that contracts need to be tailored to the circumstances, particularly where restrictive covenants are required, to minimize unintended consequences and potential liability.