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• APPELLATE COURT FINDS WAIVER OF COMMON LAW NOTICE VALID, CONSIDERS CONTINUITY OF SERVICE UNDER ESA •

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In *Ariss v NORR Limited Architects & Engineers*, [2019] O.J. No. 2801, 2019 ONCA 449, the Ontario Court of Appeal upheld a decision of a motion judge who considered the appellant's entitlements under the common law and the *Employment Standards Act, 2000* (ESA) upon termination.

BACKGROUND

In 1986, the appellant began employment with a company which was sold to the respondent employer

(NORR) in 2002. He immediately entered into an employment contract with NORR which, among other things, limited his entitlements upon termination to those available under the ESA. In 2006, he increased his hours from part-time to full-time and entered into a new contract, which again limited his entitlements on termination to those available under the ESA. The appellant agreed that he had read and understood the terms of the contract, including the waiver of entitlement to common law reasonable notice upon termination.

In 2013, the appellant wanted to return to part-time hours. He agreed to NORR's request that he resign from employment, enter into a new contract and waive his years of service and any accrued entitlement to severance pay.

Upon termination of employment in 2016, the employer only paid ESA entitlements (termination notice and benefits) back to 2013. The appellant brought an action for wrongful dismissal damages, arguing that the waiver of common law notice in 2006 and the waiver of years of service in 2013 were invalid.

THE MOTION

The motion judge found that there had been continuity of service since 1986 by virtue of section 9(1) of the ESA, which reads:

If an employer sells a business or a part of a business and the purchaser employs an employee of the seller,

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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 motion judge stated that the resignation in 2013 was "an entirely artificial attempt to create an interruption in employment when in fact there was none" and an attempt to contract out of the ESA contrary to section 5(1).

She then held that the 2013 terms of employment amounted to an amendment of the existing terms of employment and the waiver of common law reasonable notice remained valid. As a result, the appellant was entitled to eight weeks' notice of termination and 26 weeks of severance pay under the ESA. There was no entitlement to reasonable notice.

THE COURT OF APPEAL

The Court of Appeal agreed with the motion judge that the 2013 "purported resignation" was an attempt to break the continuity of service and neither party intended for the appellant to actually resign.

The Court further agreed that the 2006 agreement (and termination clause) was not invalidated, stating

[39] ... The effect of the parties' performance of the 2013 terms served, as the motion judge found, to amend the existing employment agreement, as it then stood, to provide for Mr. Ariss' requested change from full-time to part-time employment. The extant terms included the 2006 termination clause and waiver of entitlement to common law reasonable notice.

[40] It is well-established that absent clear rebuttal, employment agreements contain an implied term that employees are entitled to reasonable notice of termination: *Machtinger*, at p. 998. However, there is no dispute that the 2006 waiver of Mr. Ariss' common law entitlement to reasonable notice was clear and unequivocal. The motion judge correctly found that there was no change to this term by "the events in 2013". As she concluded, Mr. Ariss "fully understood, both when working full-time and when working part-time, that his entitlements on termination would be in accordance with the ESA".

KEY TAKEAWAYS

For employers looking to complete an asset purchase and who will be hiring employees of the vendor, it is critical to understand:

- an attempt to negotiate out of previous service may constitute a breach of the ESA; and,
- all service, including service with a vendor must be included (if no termination or distinct separation).

Employers should also consider:

- the status of the employees and whether their employment will be terminated or whether they will continue service with the purchaser; and

- if the employees are terminated and subsequently hired by the purchaser, which party (as part of the transaction) is responsible for covering termination and severance pay (if applicable).

At the very least, the purchaser must take note of section 9(1) of the ESA, consider the structure of the transaction and the potential upfront and future costs of terminating or employing the employees.

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