

ONTARIO COURT OF APPEAL COMMENTS ON SERVICE AND NOTICE CALCULATION IN THE CONTEXT OF AN ASSET PURCHASE TRANSACTION

Posted on August 5, 2020

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In the recent decision in *Manthadi v ASCO Manufacturing* [1], the Ontario Court of Appeal has provided a potentially helpful framework for employers involved in asset purchase transactions that are attempting to assess their obligations to retained longer-term employees.

In *Manthadi*, the Court clarified that where a purchaser later terminates a longer-term employee, the employee's entitlements are not determined by simply adding service with the predecessor and successor employers together. Rather, the value of the employee's experience – obtained by the successor in offering employment after the asset purchaser – is a factor in assessing the employee's notice period.

Background

The Plaintiff ("**Ms. Manthadi**") was employed by 63732 Ontario Limited ("**637**") from 1981 to November 2017, when ASCO Manufacturing Limited ("**ASCO**") purchased 637 in an asset purchase transaction.

Prior to the transaction, 637 ended Ms. Manthadi's employment and provided her with severance in return for a release. ASCO hired Ms. Manthadi but terminated her employment after the purchase. Ms. Manthadi sued for wrongful dismissal and sought damages based on her combined employment with 637 and ASCO.

The Motion Judge's Decision

Ms. Manthadi sought summary judgment of her claim, following which the motion judge made two key findings:

1. That whether Ms. Manthadi's employment with ASCO was for a fixed or indefinite term was not material because of section 9(1) of the *Employment Standards Act, 2000*; and
2. That Ms. Manthadi was entitled to damages based on her continuous employment with both 637 and ASCO, even though Ms. Manthadi had already received payment from 637 and released claims relating to her employment with that company.

The motion judge reasoned that section 9(1) of the ESA required her to consider employment with 637. Section 9(1) 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.” [emphasis added]

The Court of Appeal Decision

The Court of Appeal disagreed with the motion judge on the key points identified above and confirmed that because the plaintiff’s employment was terminated when 637 sold its assets and business to ASCO, the question of whether or not ASCO and the plaintiff agreed to a fixed-term contract thereafter was relevant. In essence, one cannot ignore that nature of a transaction and its impact on an employee’s employment when applying section 9(1) of the ESA.

Further, although it is incorrect to simply add periods of employment with the vendor and purchaser together when ascertaining the appropriate notice period, the Court also wrote that the potential difficulty faced by a longer-term employee terminated in the context of an asset purchase transaction, but offered employment by the purchaser, must be borne in mind. Employees terminated by the sale of a business often have no realistic option other than to accept the offer of a new contract of employment with the purchaser if such is offered. If they are subsequently terminated by the purchaser, the new start date of their term of service weighs in favour of a shorter notice period than had the business not been sold.

Following the decision in *Addison v. M. Loeb Ltd.*, the Court wrote that such employees should, therefore, be given recognition for their “experience” obtained working with the predecessor employer when determining an appropriate notice period, unless there is an express agreement to the contrary. Rather than simply “stitching together” both terms of service, the Court is required to consider the added value of the employee’s experience obtained by the purchaser as a factor in determining the notice period.

In this case, the Court of Appeal found that a trial was necessary to determine certain key factual issues, including whether the plaintiff’s contract with ASCO was for a fixed or indefinite term.

Takeaways for Employers

Employers in asset purchase transactions should be aware of *Manthadi’s* potential impact on the rights of employees that worked for longer terms with the vendor when negotiating terms of the business transaction and when considering whether and on what terms to offer employment to a particular individual (if that choice

is available).

As the Court of Appeal wrote in *Manthadi*, the fact that an employee was terminated by a vendor and executed a release does not necessarily mean that past service can be ignored in assessing the employee's without cause notice entitlements. This should be borne in mind when negotiating agreements with such employees.

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[1] *Manthadi v ASCO Manufacturing*, 2020 ONCA 485 [*Manthadi*].

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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