PRIOR EMPLOYEE EXPERIENCE MAY ENHANCE COMMON LAW ENTITLEMENTS

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In the recent decision of *Chin v Beauty Express Canada Inc.* ("*Chin*"),[1] the Ontario Superior Court of Justice considered the impact of an employee's service with a prior employer on the employee's entitlement to reasonable notice of termination. The Court awarded the employee an elongated notice period because of this previous service, despite the fact that the defendant employer was unrelated to the original employer, was not a successor employer at common law or under the *Employment Standards Act, 2000* (the "ESA"), and did not agree to recognize her prior service.

Background

The Plaintiff was a 69-year-old esthetician who worked at a beauty salon located inside a large Toronto department store. She worked for a prior employer for 14 years, until its bankruptcy in 2013. Following the bankruptcy, she worked six years for the defendant employer in the same location. Of note, she performed the same job for the same management team for entire the 20-year period, performing identical job functions for both employers. She also testified that the transition from one employer to the next was "seamless", to the point that she was not aware of the change until six months later.

The Plaintiff was terminated without cause in 2019 and provided with approximately 11 weeks of working notice. As she did not have an enforceable termination clause in her employment agreement, she sought additional pay in lieu of her entitlement to reasonable notice of termination. Importantly, she based her claim on the entirety of her 20 years of employment, arguing that both periods of employment should be considered in the determination of her entitlement to reasonable notice.

The Decision

The Court awarded the plaintiff a total notice period of 10 months, finding that her experience with the original employer ought to be a factor in assessing her notice period. However, the Court accounted for this prior service not as if it were time worked with the defendant employer, but based upon the skill and experience she brought with her to the employer. This "head-start" made her a more valuable employee, and therefore deserving of additional notice.

Notably, the Court expressed its broader view that the employer receives substantial saving in not having to re-train a new employee when they have prior service, which is particularly the case for a job that requires extensive training that the employee would already have under their belt, which should be well reflected in the notice required at termination.[2]

Similar Decisions

The Court's decision in *Chin* aligns with two previous cases where an employee's service with a predecessor employer was recognized as a relevant factor in calculating their reasonable notice period, *Manthadi v ASCO Manufacturing* ("*Manthadi*")[3] and *Addison v M. Loeb Ltd.* ("*Addison*")[4].

In both *Manthadi* and *Addison*, the employees were experienced workers who continued in their same roles for a successor employer following a sale of business. The Court found that in each case, the duration of employment with the predecessor employer should be factored into any notice provided upon termination, based upon the training, experience, and familiarity with the operations of the employer that the employee brought with them.

In applying this analysis to the employee in *Chin*, the Court opted to weigh the employee's prior experience as equivalent to half of that received by the employees in *Mathandi* and *Addison*. This was because the employees in *Mathandi* and *Addison* both had a higher level of training, experience, and familiarity with the operations of the employer, while the plaintiff's skills in *Chin* were "transferable from salon to salon".

Takeaways for Employers

This decision is another reminder for employers to be cognizant of employees' prior service when hiring employees as part of an asset purchase transaction, and now extending to following a bankruptcy, too. As the Court had previously established in *Mathandi* and *Addison*, if dismissed following a transaction, such employees will be entitled to a longer notice period because of their service with the predecessor employer. With the Court's decision in *Chin*, the Court has expanded this analysis, now applying this framework not only to employees with a high level of experience and familiarity with the operations of the employer, but also to employees whose skills are highly transferable from one workplace to another.

Employers hiring employees as part of asset transactions or following a bankruptcy will therefore want to keep in mind this potential for enhanced termination costs. This will particularly be the case where the purchaser will be hiring long service employees of the original employer, who may have enhanced entitlements, even if their skills are highly transferrable from one workplace to the next, and regardless of whether the employer is a successor employer at common law of under the ESA.

[1] *Chin v Beauty Express Canada Inc.*, 2022 ONSC 6178 [*Chin*].

[2] *Chin* at paras 26 and 30.
[3] *Manthadi v ASCO Manufacturing*, 2020 ONCA 485. See our colleagues previous bulletin on this decision.
[4] *Addison v M. Loeb, Ltd.*, [1986] OJ No 2367, 53 OR (2d) 602.

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A Cautionary Note