

WHO SAYS AN OFFER OF EMPLOYMENT CAN'T BE FAIR CONSIDERATION? THE ONTARIO COURT OF APPEAL WEIGHS IN ON ASSET PURCHASE TRANSACTIONS AND EMPLOYMENT CONTRACTS

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In asset purchase transactions, it is not uncommon for new employment offers to be made to the vendor's employees. Such offers often define updated employment terms, and revised termination provisions, including those which seek to limit the purchaser's exposure to those obligations arising from the deeming provisions of section 9 of the Ontario *Employment Standards Act* (ESA), which deals with continuity of employment. The recent decision from the Court of Appeal for Ontario in *Krishnamoorthy v Olympus Canada Inc.*, 2017 ONCA 873, confirms both that an offer of employment by a purchaser to a vendor's employee can be binding consideration for a new termination clause, and that the continuity of employment is not deemed to apply in all circumstances.

Nadesan Krishnamoorthy was an accomplished senior finance executive who worked with Carsen Group Inc. (2000 to 2005) and Olympus Canada Inc. (2005-2015). In 2015, he was dismissed without cause after 10 years of service with Olympus. He brought a wrongful dismissal claim seeking common law reasonable notice based on a combined employment period of 15 years with Carsen and Olympus.

The contentious issue in the lawsuit was whether or not the termination clause, which was found in the 2005 Olympus employment agreement and had been presented in connection with an asset purchase of the prior employer, was unenforceable due to a lack of consideration. The termination clause had a provision restricting Krishnamoorthy's termination entitlements to 10 months notice.

After hearing the summary judgment motion, the judge found that there was no consideration for the termination clause. This was based on the idea that the contract was presented in the context of a transaction after which employment continued. As such, the clause was ruled invalid. Krishnamoorthy was awarded damages equivalent to 19 months notice.

On appeal, Olympus' response was that the 2005 employment agreement was sufficient consideration for the

termination clause. This position was supported by the fact that Olympus had no prior employment agreement with Krishnamoorthy before its purchase of certain Carsen assets. Further, Olympus noted that section 9 of the ESA did not deem employment to be continuous for all purposes.

The Court of Appeal agreed with Olympus and concluded that the 2005 offer of employment amounted to valid consideration for the revised termination clause. The Court also noted that the wording of section 9(1) of the ESA protected specific minimum statutory entitlements (vacation, pregnancy and parental leaves, notice of termination or pay in lieu of notice and severance pay) and should not be used to assert claims and entitlements that are not captured by the ESA. As such, the summary judgment was set aside. The termination clause's compliance with the ESA was remitted to trial for determination.

Takeaways for Employers

A purchaser's ability to rely upon a written offer of employment made to a vendor's employee has been confirmed in this case. The decision is also a good reminder that in asset purchase transactions, changes to employment terms should be presented and implemented at the time of the offer letter or closing. A careful review of the employee's offer letter is crucial to ensure that it does not run contrary to employment standards rules. In this regard, it is important to note that the Court of Appeal did not address whether or not the termination provision complied with Krishnamoorthy's statutory entitlements. This issue is to be determined at trial. Since the courts continue to closely scrutinize termination clauses for ESA compliance, the final outcome of this case will need to be monitored. Whatever the ultimate outcome, however, the common practice of presenting revised terms of employment in the context of a transaction has been given some high level judicial support.

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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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