

What Happens to an Employee's Seniority after an Asset Sale?

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In the recent decision of *Manthadi v Asco Manufacturing*, 2020 ONCA 485 ("**Manthadi**"), the Ontario Court of Appeal has clarified that an employee's past service with their former employer does not automatically transfer to a successor employer for the purposes of calculating their common law reasonable notice entitlements. Instead, in order to fashion an appropriate notice period, the courts will consider the employee's prior service broadly as a form of "experience" that was to the benefit of the purchaser/successor employer.

Background

In 1981, Ms. Manthadi was hired as a welder for an Ontario company. Her employment remained secure until the end of 2017, when the company was purchased in an asset sale by ASCO Manufacturing Limited ("ASCO"). After the sale, Ms. Manthadi continued to work similar hours at a similar rate of pay for ASCO until December 13, 2017, when she was laid off and never recalled.

Following the termination of her employment, Ms. Manthadi brought a successful summary judgment motion alleging wrongful dismissal. The motion judge found the common law and ESA to mirror one another with respect to how they treat an employee's continuous employment. As such, the motion judge found that for the purposes of calculating her common law reasonable notice entitlements, Ms. Manthadi was deemed to be continuously employed by ASCO since 1981. On this basis, the motion judge found that the common law reasonable notice period for Ms. Manthadi was 20 months.

Court of Appeal

On appeal, the Ontario Court of Appeal overruled the summary judgment motion on a few grounds, including the improper use of a summary judgment motion for determining the matter. However, the Court of Appeal also took the opportunity to review and restate the law in terms of an employee's right to reasonable notice from a purchaser of an ongoing business.

The Court of Appeal began by stating that "*a sharp distinction must be drawn between termination of employment by a successor employer under the ESA and under the common law*" (at para 48). Whereas notice under the ESA provided that Ms. Manthadi would be continuously employed, the common law was "*equally clear that such employees are terminated (by constructive dismissal) when their employer sells the business and there is a change in the identity of the employer*" (at para 48).

This distinction between the ESA and common law raises problems for long-term employees. Specifically, the duty to mitigate requires wrongfully dismissed employees to minimize their damages by taking up new work. In the context of a sale of a business, long-term employees are usually offered identical employment with the purchasing company. Failure to accept this employment will likely be considered a failure to mitigate, potentially ending any claim. Accepting the employment, however, means that any claim of wrongful or constructive dismissal will likely be mitigated out of existence.

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The Court of Appeal recognized this problem for long-term employees, noting at paragraph 53:

“Thus, long-term employees, who are employed by the purchaser of their employer’s business, have little prospect of obtaining damages for the termination of their employment. Damages aside, people need jobs. 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.”

The resolution, says the Court of Appeal, involves reliance on the factors pronounced in the time-tested case of ***Bardal v The Globe & Mail Ltd. (1960), 1960 CanLII 294 (ON SC)***. Better known as the *Bardal* factors, the Court relies on such factors to determine reasonable notice at common law. In considering the *Bardal* factors, the Court accepted that the “experience” of an employee (and the benefit that such experience had for the purchaser) was a relevant factor that the Court could rely upon in fashioning the appropriate reasonable notice period where there had been a sale of a business and successive employment.

Implications from *Manthadi*

Prior to this decision, long-term employees seeking common law notice were usually given the benefit of having prior years of service recognized despite any sale of the business. This is no longer to be presumed. Rather, for calculating reasonable notice at common law, prior years of service with a former employer are translated into “experience.” While the Court of Appeal in *Manthadi* considered this to provide greater flexibility, it will almost certainly raise areas of contention for similar wrongful dismissal disputes going forward.

It remains to be seen whether trading off “years of service” for “experience” will decrease (or in certain cases increase) the notice entitlements for long-term employees being terminated after an asset sale. If notice entitlements do decrease, then purchasers inheriting a workforce may be exposed to less liability in the event of a wrongful dismissal claim.

We will continue to monitor this ever evolving area and provide you with further updates as they become available. Please note that this bulletin is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. We strongly recommend that you contact your Miller Canfield lawyer with your specific questions so that those questions can be addressed properly with you.