What's New in HR Law

Trumped-Up Resignation Does Not Create Interruption in Service, Says Ontario Court of Appeal

June 28, 2019

Bottom Line

The Ontario Court of Appeal recently held that an employee's "resignation" and immediate re-hiring under a new employment contract does not serve to void prior years of accrued service.

The Facts

John David Ariss ("Ariss") worked for NORR Limited Architects & Engineers ("NORR") and its predecessor from 1986 to 2016; a total of approximately 30 years.

In 2006, Ariss signed a fresh employment contract which detailed negotiated changes to his hours of work and compensation, and contained a provision limiting his entitlements upon termination to the minimums prescribed by the *Employment Standards Act, 2000* ("*ESA*").

Six years later, in 2013, Ariss asked to reduce his hours from full-time to part-time. NORR reluctantly agreed, but on the condition that Ariss resign from his full-time employment with NORR and enter into a new employment agreement waiving his prior years of service (including all prior entitlements to notice and severance for his prior years of service). Ariss agreed and signed the newly proposed contract.

In 2016, NORR terminated Ariss's employment without cause, and provided him with notice of termination as though he had only three (3) years of service, as per the new contract.

After his termination, Ariss filed a wrongful dismissal claim. Ariss asserted the 2013 contract was unenforceable, and claimed that he was entitled to common law reasonable notice on the basis of his full 30 years of service.

Lower Court Decision

The Ontario Superior Court of Justice found that NORR's attempt to have Ariss "resign" in 2013 and start fresh employment was not effective. The Court found that Ariss had approximately 30 years of service with NORR and that his years of service could not be voided by an artificial "resignation" and new employment contract.

The Court determined the 2013 contract was void and unenforceable. However, in light of this finding, it found the 2006 contract was still valid and served to govern Ariss' employment with the Company. The Court found that the termination provision in the 2006 contract was clear and unambiguous, and effectively limited Ariss' termination entitlements to the minimums prescribed by the *ESA*.

Ariss appealed the Superior Court of Justice's decision, asserting that since the 2013 contract was unenforceable, his termination entitlements were governed by the common law.

Ontario Court of Appeal Dismisses Appeal

The Ontario Court of Appeal dismissed Ariss' appeal. The Court of Appeal agreed that the "resignation" and attempt by NORR to break the Plaintiff's years of service in 2013 amounted to an illegal contracting out of the *ESA*. On that basis, the Court also found that the 2013 contract, given that there was no "resignation", was not actually a new employment agreement and was not enforceable.

The Court of Appeal also agreed with the lower court's finding that since the 2013 contract was invalid, Ariss' entitlements reverted to those set out in the 2006 agreement. The Court determined the parties' switch to part-time work and the corresponding reduction in salary simply amended the 2006 contract. Finding that the termination provision set out in the 2006 contract was clear, unambiguous and enforceable, the Court awarded Ariss his *ESA* minimum entitlements, calculated based on his 30 years of service.

Check the Box

This case provides a number of helpful reminders. First, although creative workarounds to the *ESA* requirements may seem appealing, employers risk invalidating their contracts of employment – and being exposed to significant liability as a result – where the minimum standards are not met. Unless there has been a bona fide break in service, there is generally little an employer will be able to do to truncate a worker's period of service.

That said, this case also highlights the value of a well-drafted contractual termination provision. A clear, unambiguous, and enforceable contractual termination provision is the most effective means of limiting common law termination liabilities. The Court of Appeal's decision in this case

helpfully reinforces that, with a properly drafted contract, even a very long service employee's termination entitlements can be limited to the minimums prescribed by the *ESA*.

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Forum: Ontario Court of Appeal

Citation: *Ariss v. NORR Limited Architects & Engineers*, 2019 ONCA 449

Need more information?

Should you need more information, please contact Danny Parker at 519-435-6007, or your regular lawyer at the firm.

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