



What's New in HR Law

Court of Appeal Restates the Common Law of Reasonable Notice Following a Sale of Business

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Bottom Line

In *Manthadi v ASCO Manufacturing*, the Ontario Court of Appeal clarified how a sale of business affects the assessment of common law reasonable notice when an employee is dismissed by a successor employer. In particular, the Court confirmed that in the context of an asset transaction, an employee's length of service with the predecessor and successor employers should not simply be added together for the purposes of calculating reasonable notice. Rather, the Court reiterated its earlier pronouncement that an employee's service with a predecessor employer should be captured in the *Bardal* analysis by assigning appropriate weight to the employee's experience from which the successor employer benefited.

Background

Ms. Manthadi worked as a welder for a numbered company ("637") for approximately 36 years. When 637 was purchased by ASCO Manufacturing Limited ("ASCO"), 637 provided notice of

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termination and severance pay to all of its employees. Ms. Manthadi accepted the severance package offered to her and, in return, signed a release to the benefit of 637.

Immediately thereafter, ASCO hired Ms. Manthadi. Approximately one month later, Ms. Manthadi was dismissed. ASCO maintained Ms. Manthadi was hired only to assist in performing general labour in connection with the move to ASCO's place of business and that her fixed-term contract had expired. Ms. Manthadi's position was that she was hired to perform her duties as a welder for an indefinite term and that the dismissal was wrongful. Ms. Manthadi sued for damages on this basis.

On a motion for summary judgment, Ms. Manthadi was awarded 20 months' pay in lieu of notice. In calculating this award, the motions judge found that Ms. Manthadi's employment with ASCO was a continuation of her employment with 637 for the purposes of calculating her entitlement to reasonable notice.

ASCO appealed the decision arguing, among other things, that the motions judge mistakenly concluded that Ms. Manthadi's employment with ASCO was a continuation of her employment with 637, and that the proper notice period was 20 months.

The Court of Appeal Restates the Law

The Court set aside the motions judge's order and remitted the matter for trial. In doing so, the Court took the opportunity to review and restate the applicable law in Ontario.

The Court ruled the motions judge had erred in reasoning that section 9(1) of the *Employment Standards Act, 2000* ("ESA") required her to consider Ms. Manthadi's period of service with 637 and ASCO as continuous. The Court clarified that while the sale of business provisions set out under the *ESA* apply when determining termination entitlements under statute, they have no bearing on a worker's common law reasonable notice.

Drawing a clear distinction between the *ESA* and the common law, the Court confirmed the approach established in its 1985 decision, *Addison v. M. Loeb Ltd.*, that the common law does not require an employee's terms of service with a predecessor and successor employer to be "stitched" together. Rather, in the context of a sale of business, an employee's service with a predecessor employer can be recognized by appropriately weighing the employee's experience and the benefit of that experience to the successor employer.

While reiterating this approach, the Court observed that, at common law, an asset transaction (which results in the change of the legal identity of the employer) triggers a constructive termination of employment. If the employee is offered and accepts employment with the purchaser, a new contract of employment is formed. While employees have a duty to mitigate their damages, the Court noted that employees terminated by operation of a sale of a business often have no realistic option other than to accept the offer of employment with the purchaser, if it is offered. The Court acknowledged an unfairness in these circumstances, because "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".

These difficult circumstances are resolved, the Court observed, by recognizing the employee's service with the predecessor employer as forming part of the experience that an employee brings to the table. As a result, while the periods of employment are not "stitched together", an employee's service with a predecessor employer is not disregarded. Rather, the employee's experience, and the benefit of that experience to the successor employer, must be considered in the context of the overall *Bardal* analysis (which involves a consideration of age, length of service, experience, character of employment, etc.) when assessing the individual's common law reasonable notice entitlement.

Based in part on the foregoing, the Court remitted the matter for trial in order that the relevant factual issues could be determined with reference to the newly clarified framework of the common law.

Check the Box

Manthadi illustrates the importance of managing employment relationships in the midst of a sale of business. In order to maximize workforce flexibility following the purchase of a business, successor employers will want to carefully consider whether to offer employment to any employees of the predecessor employer and, if so, on what terms any such employment will be offered.

Moreover, successor employers should carefully consider how the predecessor employer concluded the employment relationship and what this reveals about an employee's expectation of continued employment. As the Court's decision in *Manthadi* illustrates, the mere fact that a worker may have been provided with a severance package and executed a release does not automatically result in their period of service with the predecessor employer being disregarded.

Need more information?

For more information regarding employer obligations in the context of a sale of business, or in the context of dismissals generally, contact [Mark Van Ginkel](#) at 416-408-5560, or your regular lawyer at the firm.



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