



# What's New in HR Law

## Court of Appeal finds continuity of employment under the ESA does not mean continuity for all purposes

December 14, 2017

### **BOTTOM LINE**

The Ontario Court of Appeal implicitly finds that continuity of employment under the *Employment Standards Act* (“ESA”) does not mean continuity of all common law entitlements.

### **Facts: Employee entered into new contract with company that purchased some of the former employer’s assets**

The employee, Mr. Krishnamoorthy, was working for the Carsen Group Inc. (“Carsen”) when Olympus Canada Inc. (“Olympus”) purchased some of Carsen’s assets and offered employment to the majority of Carsen’s employees, including Mr. Krishnamoorthy. Mr. Krishnamoorthy terminated his employment with Carsen and accepted Olympus’s offer of employment.

Olympus’s offer was substantially similar to his original one from Carsen, except that the new contract included a termination clause limiting the employee’s compensation upon termination of employment. It also stated that Mr. Krishnamoorthy would be treated as a new employee.

After nine years of employment, Olympus dismissed Mr. Krishnamoorthy without cause and offered him compensation in accordance with his employment agreement.

## **Superior Court: Employee successfully argues new employment offer employment insufficient consideration for termination clause**

On a summary judgment motion before the Superior Court, Mr. Krishnamoorthy successfully argued that his employment with Carsen and Olympus was continuous due to the operation of subsection 9(1) of the *ESA*. Therefore, Olympus failed to provide him valid consideration for waiving his previous right to common law reasonable notice of termination.

Olympus Canada appealed to the Ontario Court of Appeal. The issue before the Court was whether deemed continuity of employment under the *ESA* applied for all purposes.

## **Court of Appeal: New offer was sufficient consideration for termination clause**

Writing for the Court of Appeal, Justice Pepall allowed Olympus's appeal and found that its offer of employment to the employee was sufficient consideration for the termination clause.

Subsection 9(1) of the *ESA* deems employment to continue "for the purposes of the Act" to protect an employee's minimum statutory entitlements, such as length of employment. The provision ensures that when an employee begins employment with the purchaser, the employee does not start at zero pursuant to the *ESA* calculation for notice without cause.

Justice Pepall held that while subsection 9(1) of the *ESA* operates to deem continuity of employment due to the asset purchase, this did not alter the reality that at common law, Mr. Krishnamoorthy terminated his employment contract with Carsen and entered into a new contract with Olympus, his new employer. Justice Pepall distinguished this case from others where a single employer's offer to vary an existing employment contract was insufficient consideration.

In effect, the Court of Appeal held that continuity of employment for the purpose of the *ESA* under subsection 9(1) does not constitute continuity of employment for the purpose of the common law. Subsection 9(1) of the *ESA* only comes into play when the purchaser employs the employees of the seller. It does not require the purchaser to offer employment to the seller's employees, nor does it stipulate the terms upon which the purchaser must offer employment to the seller's employees.

Therefore, the Court of Appeal concluded that Olympus had no obligation to offer Mr. Krishnamoorthy a contract of employment with an entitlement to common law reasonable notice upon termination. Instead, Olympus could offer him a contract with a termination clause that reduced this entitlement.

## **Check the Box**

The decision affirms that purchasing employers may offer new terms of employment to employees of the seller without providing additional consideration. However:

- An attempt by an employer to vary an existing employment contract must be accompanied by fresh consideration.
- Employers must still comply with the minimum *ESA* requirements.

**Forum:** Ontario Court of Appeal

**Date:** November 16, 2017

**Citation:** *Krishnamoorthy v Olympus Canada Inc.*, 2017 ONCA 873

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