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Ontario Employment Law Update

MINKEN
EMPLOYMENT LAWYERS

'Employers should ensure that proper notice is provided to employees in the event of a business discontinuance or sale. Strategic advance planning is necessary to reduce monetary payouts and minimise the risk of litigation.'

Minken Employment Lawyers

Court Rejects Capping Notice Period at 24 Months and Accepts 1 Month Pay For Each Year of Service

In Abrahim et al v. Sliwin et al, & McCalla v. Sliwin et al, 2012 ONSC 6295, a Motion for default judgement was brought by 31 employees, alleging that the defendants constituted a "common employer" and thus are jointly and severally liable for wrongful dismissal damages owing to them. The Statement of Defence of the defendants to which the employees seek default judgement was previously struck. The causes of action for wrongful dismissal damages arose when the business carried on by one or more of the defendants was discontinued, and was, perhaps, sold to someone else. The employees were given no notice, or in some cases, inadequate notice, and no termination or severance pay. Sworn affidavits were filed by the employees describing the nature of their employment, their length of service, the circumstances of their layoff or dismissal, and their attempts at mitigation, including the disclosure of any amounts they actually earned in mitigation.

Counsel for the employees proposed that a formula of one month's pay for each year of service with a cap of 24 months be used, subject to mitigation. Each employee was employed in a non-managerial position, in a relatively unskilled job, at a low rate of pay. The Court concluded that one month's pay per year of service was an untenable formula at law, citing the Court of Appeal decision in Minott v. O'Shanter Development Co. Additionally, the Court rejected the argument by the defendants that the Court of Appeal in Cronk v. Canadian General Insurance Co. "had established an upper limit of 12 months for non-managerial employees". With respect to the 24 month cap proposed by the employees the Court held that "any such approach has now been rejected by the Court of Appeal in Di Tomaso v. Crown Metal Packaging Canada LP." MacPherson J.A., for the Court of Appeal, disagreed stating that the character of the plaintiff's employment "is today a factor of declining relative importance" and that "in practical terms, character of employment is now largely irrelevant except for a small class of very senior employees.

The Court concluded that "if a cap of 12 months is not appropriate, I fail to see how a cap of 24 months, or indeed any maximum, is appropriate. Two of the plaintiffs had worked for one or more of the defendants for at least 35 years, and were 63 years of age or older. I might have decided to award more than 24 months' pay had such a request been made."

Impact of Decision on Employers

Employers should ensure that proper notice is provided to employees in the event of a business discontinuance or sale. Strategic advance planning is necessary to reduce monetary payouts and minimise the risk of litigation. An effective tool is the use of employment agreements, however great care is required in their drafting and implementation. With proper drafting and implementation a company can increase the value of their business and net greater profit on a sale as a result of the purchasing company not inheriting employees with large notice entitlements. The above is tricky and if not done properly can result in loss of employee morale, litigation costs and substantial payouts to employees. It should only be done with advice by experienced Employment Law counsel.

Impact of Decision on Employees

Employees should be aware that they may have more than only one employer to pursue in the event of a sale of closure of the business they work for. This is referred to as a "common employer" where two or more companies can be found to be "jointly and severally liable" for wrongful dismissal damages.

Further a signed employment agreement may not pass judicial scrutiny and an employee may be entitled to substantial common law notice, perhaps from the purchasing company and or it's predecessor. As there is no cap on notice, even non-managerial, unskilled workers at a low rate of pay, may be entitled to substantial notice, in exceptional cases in excess of 24 months. Experienced Employment Law counsel should be consulted to review the circumstances surrounding the termination, the employment agreement, if any, the manner in which it was implemented, and the accurate notice entitlement.

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