Knowing the business all too well: Past experience increases termination notice?

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A line of Ontario Court of Appeal decisions suggest that the benefit an experienced employee can give cannot be erased when determining common law reasonable notice simply because a new unrelated employer takes over the business.

Bardal and length of service

Under common law, it is an implied term in employment agreements of indefinite employment that employers must provide reasonable notice upon terminating an employee's employment agreement.

Courts generally determine what is a reasonable length of notice based on the factors set out in *Bardal v Globe & Mail Ltd.*,[1] known as the *Bardal* factors. Specifically, "[t]he reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."[2] However, this list is not exhaustive.

The *Sorel* approach – Focus on length of service

In terms of length of service in relation to successor employers, the British Columbia Court of Appeal in *Sorel v Tomenson Saunders Whitehead Ltd.*[3] found that it is an implied term in the contract of employment between the successor employer and those employees continuing in the business, that the employees will be given credit for past service with the company. However, this implied term can be negated by an express term to the contrary.[4]

This approach was followed in Alberta in *Radwan v Arteif Furniture Manufacturing Inc*.[5] in the bankruptcy context. In line with *Sorel*, the court in *Radwan* stated, "[t]he purchasing employer need only make it clear to the prospective employees that it will not be taking into account their prior service to negate the implied term."[6]

The *Addison* approach – Focus on benefit to purchaser

In the Ontario Court of Appeal's decision in *Addison v M. Loeb Ltd.*,[7] the court enhanced the *Sorel* approach by recognizing that the benefit received by the successor employer from the services of an experienced employee familiar with the operation of the business as a distinct factor that must be considered.[8]

The *Addison* approach was followed by the Ontario Court of Appeal again in *Manthadi v ASCO Manufacturing*,[9] which compared *Sorel* with *Addison* and concluded that, "*Addison* remains the law in Ontario. In Ontario, reasonable notice is determined by applying the usual *Bardal* factors considering all the circumstances of the particular case and appropriately weighing the experience a long-time employee brings to the purchaser."[10]

Credit given to an employee in an arrangement?

The latest decision to follow the *Addison* approach is *Antchipalovskaia v Guestlogix Inc*.[11] In *Antchipalovskaia*, the employee began her employment with the business in 2011. Following the employer's *Companies' Creditors Arrangement Act* (CCAA) proceedings in September 2016, the employee continued her employment with the successor employer, and continued to have the same responsibilities she had before the CCAA proceedings. Her employment was ultimately terminated by the successor employer in June 2019.

In *Antchipalovskaia*, the successor took two steps to expressly make clear that it was not recognizing past service. First, on September 13, 2016, the successor employer sent the employee an offer of employment with a letter stating that the employee's start date would be "the first day following the implementation of the CCAA plan of arrangement and compromise." Second, the successor employer sent a further letter stating that the new start date would be used for all employment related matters. Furthermore, as part of the CCAA proceedings, the Superior Court had made an order including a declaration that released claims by former employees that arose on or prior to the applicable Plan Implementation Date.[12]

The Court of Appeal did acknowledge the effect of the court-ordered release and did not take into account the length of service from the period prior to the CCAA proceedings. However, while not giving credit to the factor of length of service, the Court of Appeal ultimately followed the *Addison* approach and gave credit to the employee based on the factor that the successor employer benefitted from the employee's five years of prior experience performing exactly the same work without the need for any additional training.[13]

Anomaly or the future for Alberta?

Considering the benefit of an employee's experience to a successor employer as a *Bardal* factor is an interesting expansion, noting that the factors considered generally relate to the employee's ability to find alternative employment. For example, in the Supreme Court of Canada decision, *Matthews v Ocean Nutrition Canada Ltd.*,[14] the court cited the dissenting opinion of McLachlin J., as she then was, from *Wallace v United Grain Growers Ltd.*, which stated, "[r]easonable notice, in turn, represents the time that may reasonably be required to find replacement employment. It follows that

only factors relevant to the prospects of re-employment should be considered in determining the notice period."[15]

In line with the purpose of reasonable notice, past experience as a *Bardal* factor in Alberta is usually assessed in terms of its effect on the employee's ability to find alternative employment and not the benefit to the employer. Past experience may reduce reasonable notice, because it may be beneficial in finding alternative employment. For example, in *Brauer v Pure Energy Services, Inc.*, the court commented on the employee's prior experience, noting that that, "[t]hese skills and this experience would be expected to serve her well in her quest to find replacement employment."[16] On the other hand, having niche work experience could hinder finding alternative employment and increase reasonable notice. In *Schaufert v Calgary Co-Operative Association Limited*, the court stated, "[the employee] may be an attractive candidate to another grocery retailer, but it is unlikely that he would be as attractive a candidate to a retailer of other product lines, in comparison to an individual having more general experience in a variety of product lines and of similar seniority and responsibility."[17]

Although Alberta courts also assess reasonable notice based on the employee's past experience, it is a different approach than Ontario's. There are currently no Alberta decisions that have explicitly followed the *Addison* approach, so it will be interesting to see whether the *Antchipalovskaia* decision will have any effect on the approach of Alberta courts.

Key takeaways

Although the Ontario Court of Appeal in *Antchipalovskaia* accepted that recognition of prior length of service can be expressly negated, it ultimately considered the benefit that a successor employer receives from an experienced employee as a *Bardal* factor to increase the length of reasonable notice. As a result, while an express provision negating recognition of prior service is helpful in reducing common law reasonable notice, its effects have been reduced, at least in Ontario.

Furthermore, *Antchipalovskaia* raises the question of the full efficacy of releases (whether contractual or court-ordered) in discharging liability with respect to the prior period of employment in the form of benefit to the successor.

As a result, successor employers (both purchasers in a sale of a business or through formal insolvency proceedings) should consider including specific termination provisions in new employment agreements that exclude common law considerations to reduce this risk.

Footnotes

[1] *Bardal v Globe & Mail Ltd*, (1960) 1960 CarswellOnt 144, 24 DLR (2d) 140 (Ont HC) (*Bardal*).

[2] *Bardal* at para 21.

[3] *Sorel v Tomenson Saunders Whitehead Ltd*, 1987 CarswellBC 175, 15 BCLR (2d) 38 (BC CA) (*Sorel*).

[4] *Sorel* at paras 12-13.

[5] *Radwan v Arteif Furniture Manufacturing Inc*, 2002 ABQB 742, [2002] 11 WWR 559 (*Radwan*).

[6] *Radwan* at para 49.

[7] *Addison v M Loeb Ltd*, 1986 CarswellOnt 836, 53 OR (2d) 602 (ONCA) (*Addison*).

[8] *Addison* at para 23.

[9] *Manthadi v ASCO Manufacturing*, 2020 ONCA 485, 2020 CarswellOnt 10570 (*Manthadi*0.

[10] *Manthadi* at para 62.

[11] *Antchipalovskaia v Guestlogix Inc*, 2022 ONCA 454, 2022 CarswellOnt 8075 (*Antchipalovskaia*).

[12] *Antchipalovskaia* at paras 14, 21-22.

[13] *Antchipalovskaia* at para 60.

[1s4] *Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26 at para 69, 2020 CarswellNS 615.

[15] *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at para 120, 1997 CarswellMan 455 (SCC).

[16] *Brauer v Pure Energy Services Inc*, 2010 ABQB 782 at para 10, [2011] AWLD 560.

[17] *Schaufert v Calgary Co-Operative Association Limited*, 2021 ABQB 579 at para 55, 2021 CarswellAlta 2261.

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