MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

No Contracting Out of Employment Standards Minimum Even If Employee and Employer Voluntarily Agree

Employers often ask if it is possible to limit potential liability to a long-service employee by entering into a "fresh" employment contract that resets the period of service to zero.

A recent decision from the Court of Appeal for Ontario - *Ariss v Norr Canada*[1] - confirms that while an employer can successfully *limit* an employee's entitlement to common law reasonable notice, parties cannot contract out of the minimum statutory entitlements under the *Employment Standards Act, 2000* ("*ESA*"), even if they voluntarily agree to do so.

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What happened in *Ariss v Norr Canada*?

John Ariss began his employment at an architectural firm in 1986. On September 6, 2002, the firm was bought by NORR Limited Architects & Engineers, and Ariss' employment was terminated. However, on that same day he was hired by NORR on terms that limited Ariss' entitlement upon termination to the minimum statutory entitlements under the *ESA*.

In 2006, Ariss requested and was given an increase in weekly hours. In exchange, he signed a contract in which he waived any entitlement to common law reasonable notice and reaffirmed his entitlement to only the *ESA* minimums.

Seven years later, in 2013, Ariss requested and negotiated a move from full-time to part-time work. NORR agreed but only if Ariss resigned from his full-time position and accepted a "new offer of employment for part time hours" in which he waived any entitlement to notice or severance on account of his employment prior to 2013. With the benefit of independent legal advice, Ariss agreed.

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The motions judge found this was "an entirely artificial attempt to create an interruption in employment when in fact there was none".

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In 2016, Ariss was terminated without cause and provided 3.5 weeks' notice, calculated on the basis of three years' employment (2013 to 2016). At the time of his termination, he had been employed by NORR and the previous employer for an aggregate of 30 years. He brought an action for wrongful dismissal claiming an entitlement to common law reasonable notice based on the 30 years of service.

Ariss and NORR agreed the 2006 waiver of common law reasonable notice was clear and unequivocal. However, Ariss argued his "resignation" and waiver of prior service in 2013 were illegal under the *ESA*, and that this illegality invalidated his waiver of common law notice. In other words, because NORR breached the *ESA*, Ariss' presumptive right to common law reasonable notice was restored.

Summary Judgment

The motions judge found Ariss had been continuously employed since 1986, and awarded him the equivalent of eight weeks' notice and 26 weeks' severance pay under the *ESA*. The judge relied, in part, on section 9(1) of the *ESA* which states that an employee's years of service will continue with a sale of a business:

> If an employer sells a business or part of a business and the purchaser employs an employee of the seller, the employment… shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.

As for the "resignation" and rehiring in 2013, the motions judge found this was "an entirely artificial attempt to create an interruption in employment when in fact there was none". Instead, the judge found these events amounted to an "amendment" to the existing terms of Ariss' employment which included the 2006 waiver of common law notice entitlement.

As a result, Ariss was entitled to *ESA* notice and severance reflecting his 30 years of employment, but not to common law reasonable notice, which the judge estimated would have been 22 months.

Court of Appeal decision

The Court of Appeal upheld the ruling of the motions judge. The court agreed there was no termination during the sale to NORR, no resignation in 2013, and no interruption in Ariss' years of service for the purposes of calculating termination entitlements under the *ESA*.

The court also agreed NORR's efforts to create a break in the employment relationship in 2013 was an attempt to illegally contract out of the minimum entitlements under the *ESA*. However, this illegality did **not** vitiate the 2006 contract in which Ariss waived his entitlement to common law reasonable notice. The effect of the 2013 contract, the court said, was merely to amend the existing employment contract, not replace it. The waiver of common law reasonable notice therefore remained valid and binding. According to the court, Ariss "fully understood, both when working full-time and when working part-time, that his entitlements on termination would be in accordance with the *ESA*".

Lessons for employers

1. The court will invalidate any attempt to contract out of minimum statutory employment entitlements.

An employee and employer may not contract out of the *ESA* minimum standards, even if both parties voluntarily agree to do so.

2. An employer can (and almost always should) seek to limit an employee's right to common law reasonable notice through the use of a valid employment contract.

Except in the rarest of circumstances, common law reasonable notice will be considerably greater than the statutory minimum. For this reason, it is almost always prudent to have a written employment contract that limits an employee's entitlement upon termination to the statutory minimum. For an employer, this can result in significant savings and provide flexibility to make personnel decisions based on business needs rather than uncertain common law notice obligations.

The best time to introduce a written employment contract is at the time of hire, prior to the employee commencing work, so the offer of employment is the "consideration" in exchange for which the employee agrees to be bound by the terms of the contract. However, if employment has already commenced, all is not lost. Additional terms of employment can be inserted into an existing employment arrangement with careful planning and the advice of experienced employment law counsel.

3. Under the *ESA*, an employee's years of service will continue with a sale of business.

The purpose of section 9(1) of *ESA* is to protect minimum, statutory vacation, notice and severance pay entitlements when, post-acquisition, the purchaser of a business continues to employ an employee of the vendor. A purchaser cannot contract out of this obligation. However, parties can agree to waive common law entitlements. This means, if you purchase a business in an asset sale (a share purchase has different rules) and intend to modify the termination entitlements of an employee (except as required by the *ESA*), this intention should be expressly made in the offer of employment. In the absence of such a clear intention, recognition of that service may be deemed to be part of any new contract of employment.

To learn more and for assistance with all employment and labour relations matters, contact the experts at Sherrard Kuzz LLP.

[1] *Ariss v Norr Canada* 2019 ONCA 449 (Roberts, Juriansz and Brown JJA)

DID YOU KNOW?

As of September 1, 2019, Part III of the Canada Labour Code will be amended to include a right to paid personal leave and flexible work arrangements. These amendments will impact **federally regulated employers**. To learn more, contact Sherrard Kuzz LLP.

Employer Not Given Credit for Working Notice on Account of Excessive Overtime

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As many of you know, an employee whose employment is terminated without cause is entitled to statutory notice under applicable employment standards legislation and also to reasonable notice under the common law[1] (in the absence of contract limiting common law notice). From time to time, parties may disagree about the *amount* of notice owing, but rarely about the *quality* of the notice period.

In a recent decision - *Wood v CTS of Canada Co.*[2] - the Court of Appeal for Ontario held that working notice has both a quantitative and a qualitative component. The quantitative component is the length of the notice. The qualitative component is whether an employee has a meaningful opportunity to find new employment during the period of working notice. For example, if an employee works excessive overtime during a notice period, making it nearly impossible to look for other work, the court has said this notice is qualitatively insufficient.

What happened in *Wood v CTS of Canada Co.*?

The employer announced the closure of its manufacturing facility and relocation to a plant in Mexico. On April 17, 2014, employees were given written notice their employment would terminate on March 27, 2015. Most employees were extended until June 26, 2015 and five were extended further. One employee received three extensions, the final one to October 30, 2015. A key reason for the extensions was to assist the employer to stock pile parts until it had manufacturing capacity in Mexico.

During the periods of working notice, eighteen employees were required to work up to 60 hours a week, while another group of employees agreed to work up to 55 hours a week. The employer did not obtain overtime approval from the Director of Employment Standards for either group of employees, in violation of Ontario's *Employment Standards Act, 2000* (*ESA*) then in force.[3]

The employees argued the excessive amount of overtime worked during their working notice impeded their ability to look for new employment. As such, they said, the employer should not be credited for having given notice under the *ESA*, but should instead be liable for fresh notice.

The employees also argued that for those whose employment had been extended several times, the April 17, 2014 notice was no longer effective because those employees worked greater than 13 weeks beyond the original termination date. Under *ESA* regulations, an employer may provide temporary work to an employee for up to 13 weeks after the specified termination date. Beyond 13 weeks, fresh notice is required.

The employer argued it had fully complied with the *ESA* notice requirements, and further, the quality of a notice period was not relevant. To find otherwise, the employer argued, could create a windfall for an employee who consents to work overtime during a period of working notice and later challenges the quality of that very notice period.

Court of Appeal decision

The Court of Appeal agreed with the employees.[4] In essence, the court's reasons are as follows:

- By failing to obtain approval from the Director of Employment Standards to have employees work greater than 48 hours per week, the overtime worked, even with employee agreement, was unlawful. The employer is therefore not entitled to credit for working notice for any week in which employees worked overtime unlawfully. Had the employer obtained approval for the excess hours worked, the result would have been different.
- If an employee is forced to work overtime hours, the employer is not entitled to credit for any working notice during which overtime had a significant adverse impact on the ability of those employees to look for new employment.

Significantly, the court noted the normal demands of an employee's position will not warrant denying an employer credit for that portion of working notice:

> The fact that the normal demands of the employee's position leave the employee with less time to look for alternative work than if the employee were not working does not warrant denying the employer credit for a portion of the period of working notice… However, exceptional workplace demands on the employee during the notice period that negatively affect his or her ability to seek alternative work, if not consensual, may warrant disentitling an employer to credit for some or all of the period of working notice provided. In my view, overtime worked in violation of the *ESA* constitutes such an exceptional demand and cannot be considered "consensual".

What does this mean for employers?

If you are thinking of providing working notice to a terminated employee, consider the following:

1. **Working notice may have both a quantitative and qualitative component.** Requiring an employee to work excessive overtime, or overtime contrary to the *ESA*, may disentitle your organization to credit for that period of working notice.
2. **Notice of termination must be clear and unequivocal with an end date.** The clarity of the end date can be blurred by multiple extensions or delays vitiating the original notice of termination.
3. **Under *ESA* regulations, an employer may provide temporary work to an employee for up to 13 weeks following the specified termination date.** After 13 weeks, fresh notice may be required.

For assistance, contact the employment law experts at Sherrard Kuzz LLP.

[1] If both apply, statutory notice is subsumed within common law notice.

[2] 2018 ONCA 758 (Hoy ACJO, Brown and Trotter JJA).

[3] S.O. 2000, c. 41. Note: As a result of Bill 66, *Restoring Ontario's Competitiveness Act, 2019*, an Ontario employer is no longer required to obtain approval from the Director of Employment Standards before an employee may work in excess of 48 hours per week. For excess hours to be lawful, the employer must obtain employee written agreement in the form required by the ESA.

[4] Leave to appeal to the Supreme Court of Canada refused on other grounds.

MANAGEMENT COUNSEL

HReview
Seminar Series

Please join us at our next HReview Breakfast Seminar:

Navigating the Ontario *Employment Standards Act, 2000*: Common Employer Pitfalls (and how to avoid them!)

In this seminar we explore practical and strategic approaches to address common Ontario *Employment Standards Act, 2000* (*ESA*) violations and risks associated with non-compliance. Topics include:

1. **Hours of Work**
   - What records must be kept?
   - How to manage and track hours in the world of "remote work".
2. **Overtime Pay**
   - Who is (and is not) entitled to overtime pay?
   - How to effectively use overtime agreements in your workplace.
3. **Employee Misclassification**
   - When is an "independent contractor" actually an employee?
4. **Self-Audits and Ministry of Labour Complaints**
   - Understand the Ministry of Labour's new self-audit process.
   - Practical tips to handle a Ministry of Labour complaint.
5. **Class Action Liability for an *ESA* Violation**
   - How class action litigation can lead to significant liability under the *ESA*.
   - Practical tips to avoid a potential class action claim.

DATE: **Wednesday September 25, 2019; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)
VENUE: **Hazelton Manor - 99 Peelar Rd, Concord ON**
COST: Complimentary
REGISTER: **By Monday September 16, 2019 at www.sherrardkuzz.com/events/?data-category=hreview**

Law Society of Ontario, CPD Hours: This seminar may be applied toward 1.5 general CPD hours.
HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

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