CASE IN POINT: REASONABLE NOTICE

Breaking down breaks in service

How does an interruption in the employment relationship factor into reasonable notice entitlement?

BACKGROUND

Length of service determines statutory entitlements to notice of termination and severance pay. It is also arguably the strongest predictor of reasonable notice periods awarded by judges. But things can get cloudy where the employment relationship is interrupted at some point. Employment lawyer Rishi Bandhu discusses circumstances where an interruption in someone's employment somewhere along the line can influence the amount of common law notice to which an employee is entitled.

BY RISHI BANDHU

EMPLOYMENT STANDARDS legislation outlines the minimum amount of notice or pay in lieu of notice that terminated employees are entitled to receive, based on the length of time worked with the employer. However, issues can arise concerning the calculation of length of service where there has been some form of interruption to the employment relationship.

The issue is addressed by legislation. In Ontario, for example, service is not considered broken for the purpose of statutory notice of termination or termination pay if there isn't a break in service of more than 13 weeks. Breaks in service are irrelevant for the purpose of calculating severance pay — all periods of employment, whether continuous or not, and whether active or not, are accounted for in determining severance pay entitlement.

Breaks in service can, however, be relevant to the determination of reasonable notice in wrongful dismissal actions.

One interesting issue that arises from time to time is whether or not an employee's continuous service — consisting of no interruptions whatsoever — can be broken for the purpose of calculating reasonable notice. *Currie v. Nylene* is a recent decision out of Ontario that addressed this issue.

Diane Currie's service with her employer, Nylene Canada, and predecessor employers, began in 1979. In 2017, Nylene advised Currie that she was eligible to start receiving pension income while continuing to work full time. As a condition of doing so, Currie was required to sign a new contract of employment, which she did.

Nylene terminated Currie's employment 18 months later, along with the employment of several of her colleagues. Currie took the position that she was entitled to reasonable notice on the basis of 39 years of continuous employment, while Nylene argued that Currie was only employed for about 18 months — although it paid her the maximum statutory entitlements under the Employment Standards Act, 2000 based on her 39 years of service.

The court agreed that Currie was employed for 39 years and awarded her 26 months' reasonable notice, finding that there were exceptional circumstances to warrant an award above the judicially recognized maximum of 24 months. The court held that Currie did not voluntarily resign or retire from the employment relationship such that the chain of continuous employment was broken. She simply executed a new employment agreement in 2017 for the sole purpose of accessing pension benefits and had no intent to waive her prior service in exchange for those benefits.

The decision in *Currie* is consistent with a range of cases where judges have refused to disregard prior continuous service that is interrupted with a new contract of employment.

Sale of business

Where the assets of a business are sold, the law deems employment with the selling business to be terminated. If the purchaser hires the terminated employees, employment standards will deem employment continuous for statutory purposes only. Employment with the purchaser is a fresh contract of employment for common law purposes. However, purchasers often enter contracts with transferred employees that do not make it clear that prior service will not be recognized beyond statutory purposes. In such cases, with some variation depending on province, courts are likely to deem service continuous — see *Sorel v. Tomenson Saunders Whitehead Ltd.* and *Addison v. M. Loeb Ltd.*

Fixed-term contracts

Fixed-term contracts simply expire at the end of the contract. Where, however, an employer and employee enter multiple, successive fixed-term contracts, the court retains the discretion to disregard the final fixed-term contract prior to termination. In these circumstances, the court treats the fixed-term contract as a vehicle to negotiate terms and conditions on an annual basis, in a relationship that the parties otherwise consider to be indefinite and long-term. The Ontario Court of Appeal's 2001 decision in *Ceccol v. Ontario Gymnastic Federation* remains the leading decision in this respect. In that case, the court awarded reasonable notice and disregarded a series of 16 fixed-term contracts that were automatically renewed by the parties until the last contract.

Change in employment status

In these cases, a resignation is offered by an employee not to terminate the relationship but to mark a transition to a different status.

In *Ariss v. NORR Limited Architects and Engineers*, the plaintiff, John Ariss, desired to transition to part-time employment with NORR after 27 years of continuous service that began in 1986. The employer was prepared to change his status provided Ariss resigned from employment and waived his prior service and any accrued entitlement to severance pay. Ariss agreed to do so. When his employment was terminated in 2016, his employer provided him with notice of termination dating back to the start of the part-time agreement in 2013. He was given only 3.5 weeks' notice of termination.

The Ontario Court of Appeal agreed with the motion judge's decision that Ariss' resignation was not effective to interrupt his service for statutory purposes on the basis that it was "an entirely artificial attempt to create an interruption in employment when in fact there was none." Ariss was, nevertheless, limited to the statutory minimums because NORR had validly contracted out of the common law.

The principle underlying each of these decisions is that an employer that benefits from an employee's skillset and knowledge, gained from several years of loyal service, ought not be able to disregard that service time, unless there is a logical break and a written contract that is clearly drafted, supported with consideration and compliant with statutory requirements.

In one curious decision, *Theberge-Lindsay v. 3395022 Canada Inc. (Kutcher Dentistry Professional Corporation)*, a break in service was found despite the continuous nature of the employment relationship.

The employee started work with the employer in 1993. In 2005, she gave the employer more than three months' written notice of resignation. Prior to the effective

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date, the resignation notice was rescinded, which the employer accepted and the relationship continued for some time. The employer later offered a new agreement that limited her to the ESA minimums. The employee signed it and the relationship continued uninterrupted until it was terminated in 2012. The employee argued that her employment began 1993. The employer argued that service time began in 2005.

The trial judge found that the resignation did not interrupt the continuity of the employment agreement. However, the Ontario Court of Appeal disagreed.

According to the court, the employee's resignation broke the chain of employment such that the employee had only been employed since 2005, the date of the new contract. The court held that "the minimum notice is the maximum amount to which the respondent is entitled, measured from 2005."

The decision in *Theberge-Lindsay* is difficult to reconcile. It is scant on reasons and the wording of the 2005 contract is not disclosed. Given that the employment relationship continued after the recission, there appeared to be no consideration for the 2005 agreement. Further, even if there was consideration, it ought not to have reset her service to 2005 for statutory purposes, as the Court of Appeal held. The employee had been employed continuously since 1993, with no breaks in service. Her statutory entitlements, assuming the 2005 agreement validly contracted out of the common law, should have been measured from 1993.

In *Currie*, Nylene relied on Theberge-Lindsay to justify the break in service allegedly created by Currie's "retirement." The court, however, distinguished Theberge-Lindsay on the basis that the employee intended to voluntarily resign, while Currie did not. Despite the anomalous features of *Theberge-Lindsay*, the case indicates that an employee's continuous service may be broken in circumstances where an employee provides notice of resignation, rescinds it and agrees to a new contract of employment.

Employers may disrupt an employee's service in circumstances where there is a clear and objective break in the employment relationship. The artificial or coerced use of a resignation, as in *Currie* or *Ariss*, to signal a change in employment status is unlikely to create a break in service that is judicially recognized.

Breaks in service may be recognized where the resignation is voluntary and effective, causing a real temporal break, or where the resignation has been rescinded and accepted by the employer.

In any case, an employer wishing to reset an employee's service time may do so provided it uses a written contract that adheres to the following principles:

- It uses clear and unequivocal language.
- It is supported by valid consideration.
- It does not contract below employment standards legislation.

For more information, see:

- *Currie v. Nylene Canada Inc.* 2021 ONSC 1922 (Ont. S.C.J.).
- *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987), 39 D.L.R. (4th) 460 (B.C. C.A).
- *Addison v. M. Loeb Ltd.* (1986), 25 D.L.R. (4th) 151 (Ont. C.A.).
- *Ceccol v. Ontario Gymnastic Federation*, 2001 CarswellOnt 3026 (Ont. C.A.).
- *Ariss v. NORR Limited Architects & Engineers*, 2019 ONCA 449 (Ont. C.A.).
- *Theberge-Lindsay v. 3395022 Canada Inc. (Kutcher Dentistry Professional Corporation)*, 2019 ONCA 469 (Ont. C.A.).

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