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UPDATE

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Rehiring Former Employees: Avoiding the Risk of "Continuous Employment"

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In a recent decision, the Ontario Court of Appeal has made it clear that employees with multiple terms of service for the same employer may be treated as having continuous employment for the purpose of assessing common law notice.

The Facts

In *Brien v. Niagara Motors Ltd.* (click here to view the entire decision), the Plaintiff employee was office manager of the Defendant at the time of her termination and had worked for the employer over a period of 23 years, initially as a clerk. She had, however, resigned her employment on two occasions during that time. On the first occasion she had a child, but returned to work after 8 months. This period was longer than the statutory maternity leave at the time. She left again in October 1984 while pregnant and her second child was born in March 1985. She returned to the dealership as office manager in November 1986, after an absence of roughly two years.

On the second occasion, the Plaintiff was called by the office manager, who was retiring, who asked her if she was willing to return to work as his replacement. The position as office manager which she assumed had more significant duties, including supervision of clerical staff, payroll deductions, bank deposits, trial balance and monthly statements, accounts receivable and troubleshooting for the computer system. She also had authority to hire and terminate staff in consultation with the general manager. There was no written agreement between the parties, either initially or at the time of either of the Plaintiff's returns to work.

On both occasions on which the Plaintiff returned to her employment, she was not asked to complete a job application or submit a resumé. There was no hiring process, nor had there been advertisements for the position she filled. During her original hiring, there was both an advertisement and a hiring process and she had submitted a resumé. The evidence disclosed that the Plaintiff's return to work on each occasion was seamless, and although her position was not being held for her, she had been told that the dealership wanted her back and was willing to return her to work as soon as she was ready.

Findings at Trial

The trial Judge held that even a lengthy gap in service, particularly if associated with child-bearing, did not render the Plaintiff a "new hire" on each occasion that she returned to work. The fact that she had been welcomed back on each occasion, was not treated as a new hire, and was invited to accept the office manager position upon her supervisor's retirement, led to the trial Judge holding that the employee's length of service was the full 23 years. This led the Plaintiff to be awarded the maximum amount of notice under the common law in Ontario, 24 months, in addition to which she received 2 months of *Wallace* damages for the bad faith conduct of the Defendant, and 23 weeks of severance pay under the *Employment Standards Act* (ESA).

Findings at the Court of Appeal

The Defendant appealed to the Ontario Court of Appeal on three grounds: firstly, that the two year gap during which the Plaintiff bore and raised her second child was too great for there to be continuity of employment; secondly, that the decision in *Honda v. Keays* had overturned *Wallace* damages, and thirdly, that the trial Judge had erred in awarding the ESA severance pay in addition to the 24 month notice period, given previous case law that holds that severance pay is included in the common law notice period.

On the last two of these grounds, the Defendant was successful. However, on the first ground, the Court stated:

> The Respondent was invited back after two years even though she was not on official maternity leave. She left the employment for family reasons and not for another job. The gap is only two years and the Respondent, having been invited back, was reintegrated into the employer's employment as if she had never left. For example, she was given two weeks' vacation within the first year without first working for 12 months as a new employee would have to.

In other words, the Defendant having treated the employee as "returning", albeit not from an official maternity leave, it was not entitled after the fact to treat the employment as new employment for the purpose of calculating the employee's length of service.

Lessons for Employers

This decision is instructive for employers who find that good former employees have become available to return to work for them. If the return to work is "seamless", that is, no resumé is submitted or application filled out, there is no probation period and the employee is grandfathered for vacation and other entitlements based on length of service, the probability is very high that, even if the employee left to join another employer for a short period of time, the employment will be viewed as continuous. If the employee has been out of the workforce altogether, the probability of a finding of continuous employment is even higher. *Brien* and other cases suggest that the employer's attitude toward the returning employee, *i.e.* its residing the trust and rewards in them that only come with service, means that the employer cannot later take the position that the earlier service does not "count."

The second lesson for employers to learn from *Brien* and similar cases is that, if it is considered desirable to treat the employee in a seamless fashion which would otherwise attract continuity of service in the manner set out above, an employment contract which stipulates the entitlement upon termination is desirable. In this way it will be apparent to the employee that, although there is grandfathering of service relative to certain benefits, and even though there may be no probation period, the employee's service for the purposes of determining the notice period on termination will be based on the new hire date. The termination clause can be fixed or variable in nature although, in the latter case, the contract must expressly stipulate that the calculation will be based on the last date of hire, so that there can be no misunderstanding or allegation of ambiguity.

Employers should also be aware that if they have not previously paid statutory severance pay to an employee, the Employment Standards Act requires that all years of service which the employee spent with the employer be counted in that calculation. Accordingly, in drafting an employment contract for returning employee, it is important to ensure that there is no contracting out of this statutory entitlement. At the outset, the minimum and maximum periods of statutory notice and severance pay applicable to the employee should be determined to ensure that, no matter when a termination occurs, the contractual provision will at least meet the Employment Standards minimum entitlement.

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