Advice from

THE BATTLEFRONT

Insight from life in the trenches

Ian S. Scarlett
416.746.4710
iscarlett@loonix.com

Ian S. Scarlett publishes as TheMidMarketLawyer.com and has been practising mid-market business law on the front line for more than two decades at Loopstra Nixon LLP. Ian has experience in advising clients in a broad range of industries across Canada as well as assisting foreign companies on their inbound Canadian legal needs. Ian is the former Managing Partner and is currently on the Executive Committee of the firm. More information on Ian is available at themidmarketlawyer.com including previous issues of ***The Battlefront***.

Selling Your Employees – *The Ties That Bind*

When selling all the assets of its business, companies frequently also negotiate that the purchaser will hire all (or most) of the seller's employees upon similar terms and assume all employment-related obligations. Purchasers frequently need these employees to continue operating the business and sellers get to minimize (or eliminate) the cost of terminations. Employees are working for the seller one day, and then for the purchaser on the next day on similar terms in the same working environment. As a terminated employee has a duty to mitigate (reduce) their damages, accepting employment from the purchaser on similar terms would achieve the seller's goal of eliminating termination costs. However, this type of approach is not without risks and a seller may remain liable for termination costs despite the purchaser having agreed to assume all employees.

This edition of ***The Battlefront*** reviews a recent Ontario Superior Courts of Justice decision regarding the liabilities of a seller when transferring employees in conjunction with the sale of assets.

The Facts

In the case of *Dussault v. Imperial Oil Limited* (Ontario Superior Court of Justice, February 20, 2018), Imperial Oil (the Seller) operated a chain of retail stores across Canada. The two plaintiffs were senior employees of the business with more than thirty years service each. The Seller advised all employees that it was commencing a process to sell the retail chain division which would likely take 8 to 12 months to complete. Thirteen months later the Seller entered into a conditional sales agreement with a Buyer to sell the retail chain. The plaintiffs, among others, were advised that the Buyer would hire all employees and continue their current salary for the next 18 months. The Seller offered a one-time payment to each employee if they accepted the Buyer's employment offer. Despite repeated requests by the plaintiffs, neither the Seller nor the Buyer would provide information on how the sale would affect the plaintiffs' jobs, or the size of the lump sum payment amount, or any commitment regarding salaries beyond the 18 month window after closing.

Each plaintiff received an offer of employment from the Buyer which confirmed their salary would be unchanged for 18 months and also that each plaintiff would have to release the Seller from all claims. However no other future salary guarantee was given and the Buyer's current salary ranges for comparable positions were significantly lower that than paid by the Seller. Additionally, the offers specifically stated that the plaintiffs' years of service for the Seller would not be recognized by the Buyer.

Both plaintiffs rejected the employment offers from the Buyer. A few months later, the Seller gave working notice to each plaintiff that their employment was being terminated and provided a severance amount equal to 18 months salary.

This represented the plaintiffs' minimum entitlements under the *Employment Standards Act, 2000*. On termination, both plaintiffs elected to retire and commence receiving pension and benefits. Both attempted to find other employment but neither were successful.

The Complaint

Each plaintiff subsequently sued the Seller for wrongful dismissal claiming an entitlement to 32 months severance. The Seller responded by claiming both plaintiffs had failed to mitigate their damages by not accepting employment with the Buyer.

The Outcome

The Seller advanced numerous defences. First, the Seller argued that the plaintiffs had received notice of possible termination from the time of the first announcement that the sale process had started. From that first announcement until the end of the 18 month salary guarantee offered by the Buyer represented a total of 31 months which should be seen as sufficient notice. However, the court did not accept this argument. To qualify as proper notice, the communication must be clear and unambiguous. When announcing a process to investigate selling the retain chain, the Seller did not specifically inform the plaintiffs that their employment could be in jeopardy. During the sale process, neither the Seller nor the Buyer clearly confirmed the transaction would close. The Seller advised all employees that their employment would not be terminated and the Buyer's subsequent offer of employment specifically stated that the offer was conditional upon the completion of the transaction. The plaintiffs had not be given clear and unambiguous notice that their continued employment was at risk.

The Seller also argued that the plaintiffs could have mitigate their damages by accepting employment by the Buyer which would have reduced the severance costs of the Seller. However, when an employer breaches the employment contract and then demands the innocent employee take positive action, the court will impose a heavy burden of proof on such employer. The court rejected the Seller's mitigation argument on the following various grounds.

First, the Buyer's employment offer was made prior to the Seller delivering a notice of termination. When receiving the new employment offer, the plaintiffs had no duty to mitigate as their employment had not been terminated. The Buyer's offer was not repeated after the Seller terminated the plaintiffs' employment. As a result, the plaintiff's duty to mitigate had not been triggered.

Second, the Buyer's employment offer required the plaintiffs to release the Seller from employment claims. This additional requirement meant the offer was not on similar terms, so the plaintiffs could not be obligated to accept the new employment terms.

Third, the Buyer's employment offer specifically stated that the plaintiffs' years of service would not be recognized despite the business being purchased as a going concern. The Seller had unsuccessfully resisted this term and subsequently advised all employees that this provision was likely unenforceable. However, the court found that it was not reasonable for the plaintiffs to accept this risk on the hope that it could be successfully challenged in the future.

Fourth, the court accepted the plaintiffs' evidence that they would have to conceal their higher salary from their new co-workers which could result in a hostile working environment. It would be reasonable for the plaintiffs to anticipate that earning a salary higher than their superiors would be uncomfortable under the circumstances.

Fifth, the Buyer's employment offer included less generous benefits and salary. The Seller offered a one-time lump sum top up payment for reduced benefits, but would not reveal the amount until the plaintiffs accepted the employment offer. The Buyer also would not guarantee salary after 18 months. Collectively these factors made the proposed offer not comparable to the existing employment.

For all these reasons, the court held that the Seller had not satisfied its burden of showing the plaintiffs acted unreasonably in not accepting the Buyers' offer of employment. As a result, the court awarded each of the plaintiffs damages in the amount of 26 months salary.

Thoughts to Take Away

Dealing with employees in the context of selling a business must be handled carefully to meet all the legal requirements placed on an employer. Some comfort may be obtained by the buyer agreeing to assume the employment obligations, but the seller must carefully consider the consequences of employees who do not accept employment with the buyer and who may make a claim against the seller in the future. Transferred employees who are later terminated by the buyer for any reason may still be able to lay claim against the seller for alleged damages resulting from a breach of the employment law. The burden rests on the employer to carefully consider its employees when exiting its business through a sale. Both the substance of employment offers and the procedure for making such offers should be thoroughly set out in the purchase agreement, or the seller may be unknowingly retaining liability for any legal non-compliance.

To avoid wrongful termination claims when selling its business, the employer must put thought, effort and planning on how to properly sever ***the ties that bind***!
