

Ontario Employment Offers in Asset Transactions — Truly New Employment or Not?

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In asset transactions, a common question is whether an offer of employment from a purchaser is considered new employment or not. A related question is whether such offers can be considered fresh consideration. The Ontario Court of Appeal has reaffirmed that the answer to these two questions is a strong "yes." Readers are cautioned that this decision does not reflect the law in all Canadian jurisdictions.

In *Krishnamoorthy v. Olympus Canada Inc.*, 2017 ONCA 873, Olympus Canada purchased some of the assets of the company that employed Mr. Krishnamoorthy in 2006. Olympus Canada offered employment to Mr. Krishnamoorthy on substantially similar terms as he had with his then-current employer/the vendor, except that it provided for a contractual termination provision that contracted out of common law notice. The offer also indicated that Mr. Krishnamoorthy would be treated as a new employee except as required by applicable legislation or the offer. Mr. Krishnamoorthy signed the employment agreement.

Fast forward nine years and Mr. Krishnamoorthy's employment agreement was terminated without cause. Olympus Canada offered him compensation in accordance with the 2006 offer of employment. Mr. Krishnamoorthy refused and commenced litigation.

There were a number of issues before the Court, but the key issue for the purposes of this article was whether the 2006 offer of employment from Olympus Canada constituted fresh consideration. If the offer did not constitute fresh consideration, the contractual termination provision would not be binding because, in Ontario, a promise to perform an existing contract is not fresh consideration.

The Ontario Court of Appeal confirmed that the offer of employment from Olympus Canada constituted fresh consideration. The Court affirmed that employment standards legislation, which provides for continuity of employment, does not mean continuity for all purposes. However, the Court also ordered a trial on whether the termination clause was invalid, because it is alleged to have not complied with the minimum statutory entitlements under Ontario employment standards legislation and to have had its "substratum ... lost" over the years.

Of course, while this decision provides a fair amount of flexibility to purchasers offering employment to candidates in Ontario, it does not provide guidance on what those terms should be, the enforceability of those terms on other grounds (e.g. termination provisions that comply with employment standards statutory entitlements, and restrictive covenants that satisfy public policy-related tests) or any obligations with respect to those terms. Practically, the flexibility may be limited in some transactions due to a covenant provided by the purchaser. The Ontario Court of Appeal has placed a piece of the puzzle, but prudent purchasers will know that there are often other pieces of the puzzle to consider.

Any member of our [Labour and Employment Group](#) would be pleased to advise you further with respect to offers of employment in asset transaction contexts, share purchase contexts

and all other transaction-related questions. Our group has extensive experience in employment arrangements in transactions, including pensions and benefits matters.

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