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PUBLICATION

Successor Employer Liability for Common Law Notice in the Building Services Sector: Really?

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The Ontario provincial legislature has addressed various forms of job protection for both union and non-union employees in the "building services sector". The legislation primarily serves those hourly paid employees who cater, clean and provide security services at site specific building premises.

The current requirements of the Ontario *Employment Standards Act, 2000* ("ESA") which were implemented in 2001, expressly dictate that when there is a change in building service provider, for example a new cleaning company comes into the building, the new building service provider must pay the ESA minimum termination and severance payments to the current building service provider's employees at the building who are not offered comparable employment with the new service provider or retained by their current employer at a different building site.

These provisions are clearly intended to create an incentive/disincentive to the new building service provider to offer employment to all employees working at the building and not leave those employees unemployed or decrease the hourly rates paid to these already vulnerable employees. The provision is also notably silent on any contractual common law requirements of either the current building service provider or the new building service provider to provide "reasonable" or other notice of termination or payment in lieu thereof. The ESA provides a specific and express code of statutory employment rights and does not convey common law contractual rights, express or implied.

In *Kondaj v. Crossbridge Condominium Services Ltd.*, 2025 ONSC 3905, the Superior Court of Justice has now held for the first time that when a new building service provider declines to hire a current on-site building service employee, the new building service provider bears responsibility not only for the minimum ESA termination and severance obligations but also, as a matter of at least "initial liability", for payment in lieu of the employee's contractual common law notice of termination. That is a seismic shift in the common law in the province of Ontario.

Background

Mr. Kondaj was the on-site condominium manager employed by Crossbridge Condominium Services Ltd. ("Crossbridge"), the initial building-services provider, at the SoHo Hotel and Residences in Toronto. When Crossbridge's contract ended on November 30, 2023, Duka Property Management Inc. ("Duka"), became the new building-services provider on December 1, 2023. Duka met with Mr. Kondaj and ultimately declined to hire him. Duka paid Mr. Kondaj his statutory termination pay pursuant to the ESA, as required.

Upon the urging of the plaintiff in a wrongful dismissal action against both Crossbridge and Duka, the Court held at first instance that where a new provider does not retain an incumbent on-site employee, the new provider is responsible not only for ESA termination/severance but also, as a matter of at least "initial liability", for the failure to provide common law reasonable notice of termination to the employee, which in this case was ten (10) months' reasonable notice plus 10% for benefits, less the ESA termination pay already paid.

The Court's Reasoning

The Court concluded that the incoming building service provider should bear responsibility for the common law notice of termination in respect of the non-retention of employees because this outcome best "aligns" with the legislative intention, scheme, and language of the ESA's building-services provisions. On intention, the Court emphasized that the provisions were enacted to stabilize employment in a sector marked by frequent contract turnover; assigning common law liability to the successor incentivizes retention and avoids fragmented, two-track claims against different providers. The Court noted that Part XV of the ESA establishes minimum standards which are supplemented by common law. Hence, an entirely new common law obligation was born.

The Court cautions that under the old regime a new building service provider could harm its competitors by forcing the former building service provider to bear the cost of its contractual common law notice to its employees, "even when the contract was lost through no fault of the old provider". Alternatively, it also seems quite possible that by forcing a new building service provider to assume contractual common law notice obligations to employees, it actually protects an inefficient or a less than competent service provider, which the building owner wishes to replace for legitimate business reasons, from competition.

The Court further notes that where a new provider assumes existing employees and later terminates their employment, there is "no doubt that the new provider would be liable for common law notice." This observation, however, does not address that a successor may very well enter into an employment agreement with the employees which would limit or displace common law reasonable notice and would not in fact be liable for "common law notice". A strategic building services provider might actually offer and enter into a new contract with the employees which limits the employees' rights upon termination to the ESA statutory minimums and then subsequently terminate the employee to avoid any common law claims for "reasonable

notice" against either and both the new building service provider and the old building service provider, actually making the employee worse off.

Practical implications for Employers

Until the law is settled, successor building service providers should build successor-liability modeling into bids and project budgets. Successor providers should obtain information on tenure, roles, and compensation details to assess potential common law exposure of assuming a building services contract and either hiring or not hiring the existing building service provider's employees. Successor providers should consider requesting indemnification terms from the building owners for assumed employee liabilities, knowing however that such a request may very well disqualify their bid. Consideration should also be given to ensuring that offers are made to all employees with termination provisions limited to the ESA statutory minimum requirements to avoid common law claims for "reasonable notice".

Given the novelty of the ruling, the decision should be treated as the current working assumption in Ontario and employers should plan accordingly. Until there is appellate guidance, prudent providers should assume successor liabilities for both ESA and common law obligations and structure bids, due diligence, and contracts accordingly.

For specifically tailored advice on Ontario successor-liability risk under the ESA and the Labour Relations Act, please reach out to a member of Blaney's Labour and Employment Group.