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CaseNote
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FORMER EMPLOYERS BEWARE! FORMER EMPLOYER LIABLE FOR NOTICE WHERE EMPLOYEE DISMISSED BY NEW EMPLOYER

Major v. Philips Electronics Ltd.
2005 BCCA 170, 2005 CarswellBC 666, 253 D.L.R. (4th) 94 (B.C. C.A.)

Major, a professional engineer, had been employed overseas in various management capacities by Philips from 1994 until 2001. In 2001, he accepted an offer from Philips to become the site manager of its plant in Richmond, British Columbia. Major left his position in India and took up employment in Richmond on May 1, 2001.

Philips notified its Richmond employees on July 18, 2001 that it intended to close the plant and that they would be terminated as of August 31, 2001. Later in July, the company announced that it was in negotiations to sell the plant to Holley Communications Canada Inc. Major was informed by Holley on July 31 that if it did acquire the plant, it would offer him employment "on terms substantially similar to the terms of his employment with [Philips]". Holley purchased the plant and on September 14, 2001 Major accepted Holley's offer of employment. Among the provisions included in the employment agreement were that Major's seniority would run from 1994 and that he would be afforded vacation entitlement and other benefits accrued with Philips as if they had been earned with Holley. Major's position and duties remained unchanged.

Differences arose, however, between Major and Holley and on October 9, 2001 Holley terminated Major's employment. He accepted Holley's offer of seventeen weeks' pay in lieu of notice. He released Holley from liability, but deleted a provision of the release document that would have released Holley's "predecessors", thus setting the stage for an action for damages for wrongful dismissal against Philips.

Not surprisingly, Phillips did not believe that it should be held liable for damages for wrongful dismissal of its former employee. The case was initially heard at the British Columbia Supreme Court, which held that Philips could indeed be held liable. Philips appealed to the Court of Appeal of British Columbia.

One of the main grounds to Philips' appeal was that once Major entered into the new contract of employment with Holley, there was a novation and that the contract between Philips and Major was extinguished. The criteria for a finding of novation are as follows:

1. The new debtor [employer] must assume the complete liability;
2. The creditor [employee] must accept the new debtor [employer] as principal debtor and not merely as an agent or guarantor; and
3. The creditor [employee] must accept the new contract in full satisfaction and substitution for the old contract.

The Court of Appeal agreed with the trial judge's finding that in *this* case, direct evidence was required showing an express communication that the employment contract with Holley would release Philips from any further obligation. Absent such a finding, they were not able to conclude that there had been a novation.

Philips next turned to s. 97 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, which states:

> 97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

Philips argued that the fact that employment was "deemed...to be continuous and uninterrupted by the disposition", and that the employee of the business "takes with him his length of service for all purposes", was not consistent with the right to sue the previous employer for damages based on service preceding the sale of the business.

The Court of Appeal again agreed with the trial judge and found that s. 97 did not apply in the circumstances of the case. The section specifically states that it applies "for the purposes of this Act". Consequently, it did not extinguish Major's common law rights against Philips. The Court of Appeal noted that "s. 97 of the *Act* is intended to supplement the common law - it does not strip employees of their common-law rights. Since [Major] relied in this case on his right at common law to claim damages for [Philips]' breach of their employment contract, s. 97 is not relevant."

Our Newfoundland and Labrador clients should note that this Province has a similar (but not identical) provision in s. 7 of the *Labour Standards Act*, RSNL 1990, c. L-2:

> 7. Where an employer transfers, assigns or conveys the undertaking of that employer to another person or firm, and that person or firm continues the undertaking so transferred, assigned or conveyed, the continued and uninterrupted employment of the employee by the person having so acquired the undertaking shall be considered to be continuous with the period of employment with the 1st named employer, and counts as against the new employer for the *regulation of the rights, benefits and privileges of the employee under this act*. (Italics added)

Philips' third ground of appeal was with regards to the amount of the award. The trial judge had found that Major's period of notice began to run at the end of August 2001 when the sale of the business to Holley was completed. The Court of Appeal instead found that the period of notice began to run on July 18, 2001, which was the date that Philips advised Major that it would not be carrying on with the business. Accordingly, salary paid by Philips to Major from July 18, 2001 until the date that Major began his employment with Holley was to be deducted from the award, in addition to deductions for the seventeen weeks pay in lieu of notice paid to Major by Holley and the earnings he received for the month he was employed by Holley.

Companies that are involved in the buying or selling of enterprises should take note of this case and the issues that it presents. Companies that are selling their businesses will want to particularly consider the implications of the decision, and take the necessary steps to avoid future liability for wrongful dismissal where their employees have accepted continued employment with the purchaser of the business. Possible steps that may be taken in such a circumstance include obtaining an "express communication" from the employee that he or she is releasing the vending company from further obligation as well as addressing the issue of potential liability for wrongful dismissal during the negotiations of the sale of the company.