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Selling Your Dental Practice? Beware of Staff Liability

It happens every day. A receptionist with 25 years of experience working at the same dental office shows up only to be told that the practice has been sold. Her heart sinks. She fears she might lose her job – or that she'll be asked to stay on, but her new terms of employment won't be as favourable. She doesn't think she can find alternative employment easily at her age.

She contacts an employment lawyer to find out where she legally stands vis-a-vis the dentist who sold the practice. What happens next could result in a time-consuming, emotionally draining and costly legal battle for the selling dentist… or perhaps not. It all depends on what the selling dentist did or didn't do leading up to the asset sale.

Asset Sale

This article will discuss staff liability for the selling dentist based on the common law (i.e. judge made law) and the *Employment Standards Act,* 2000 (the ESA) in the context of an asset sale; a following article will discuss staff liability for the purchasing dentist in the context of an asset sale.

In an asset sale, a selling dentist or dentistry professional corporation sells the assets that make up the dental practice to a purchasing dentist or dentistry professional corporation. Those assets typically include the clinical and administrative equipment, furniture, supplies, computer hardware/software, and the goodwill (patient records, etc.). Generally, if the purchasing dentist hires the staff, a new employment relationship will commence, and the previous relationship with the selling dentist will be severed.

This differs from a sale of shares of a dentistry professional corporation, where there is no change in the legal identity of the employer;[1] here, the purchasing dentist simply acquires the employer's ownership without automatically severing pre-existing employment relationships.

Worst-Case Scenario for the Seller

In the worst-case scenario, long-term staff never signed a written employment agreement with the selling dentist.

On completion of an asset sale, staff who aren't hired by the purchaser are considered to have been terminated by the seller. At that point, they can make a claim against the seller for not having received sufficient termination notice.[2]

How much could that be? For verbal employment agreements with an indefinite term,[3] the common law generally requires an employer to provide an employee, prior to termination, with one month of working notice, or payment in lieu of such notice, for each year of service, up to 26 months.[4] For example, in *Dechene v. Dr. Khurrum Ashraf Dentistry Professional Corp.*[5], the Court ordered Dr. Khurrum Ashraf Dentistry Professional Corporation to pay Jennifer Dechene (a part-time hygienist) $25,000 after it terminated her without providing any notice; that amount represented six months' worth of notice, after factoring in Ms. Dechene's six years of service.

Why wouldn't a purchasing dentist want to hire all of the staff and thereby relieve the selling dentist of such liability? Isn't it in the best interest of the purchaser to do so, since staff know the practice and the patients? The issue here is that there's a risk that the purchasing dentist might not see eye-to-eye with the staff when it comes to things such as practice philosophy. Personality types may also clash. That risk of the unknown could translate into a loss of patients and goodwill. Thus, a purchasing dentist may demand, in the context of agreeing to hire staff after the completion of an asset sale, that the selling dentist accept a discount to the purchase price or contribute to some or all of the employee termination costs, should the purchaser terminate any employee within a set timeframe (e.g. 90 days) after the completion of the asset purchase transaction.

So what can the selling dentist do to mitigate these risks?

Best-Case Scenario for the Seller

Ideally, the selling dentist should address staff liability long before contemplating an asset sale. This is done by introducing working notice to all the staff – sometimes upwards of two years before selling. Working notice is a written document, provided to staff, that states that their employment will come to an end after a set length of time. Sometimes, the dentist also states in the notice that it is his or her current intention to present the staff with an employment agreement at the expiration of the notice period. An employment agreement is a written document that governs the working relationship between an employee and employer in many important ways (for example, with respect to remuneration, position, schedule, benefits, termination, restrictions, etc.). The amount of notice a particular staff receives is generally equal to the amount of notice they would be entitled to under the common law (discussed above).

Importantly, during the notice period, the employer cannot unilaterally make significant changes to the employment relationship that could be materially disadvantageous to the staff – otherwise the dentist employer could be sued for constructive dismissal (a topic for another article). It's also imperative that working notice be prepared by a professional and delivered to staff in person, preferably at a regular team meeting, using an appropriate tone and message to mitigate against lawsuits and lowered employee morale.

Once working notice expires, dentist employers have a few options. First, they can keep staff on with a verbal contract on similar/different terms to what they previously had; this time around, however, the staff's length of service with the seller will be set back to zero. Second, a dentist employer can negotiate a written employment agreement. Finally, the dentist can terminate staff without providing any further notice or payment in lieu of notice.

Ideally, the dentist employer and staff will enter into a new written employment agreement containing clauses that favour the employer/selling dentist and any purchasing dentist. These clauses will include, for example, a fixed term (where appropriate);[6] an assignment/novation clause (i.e. the employees agree that, if they accept employment with a purchasing dentist, then they would have no rights against the selling dentist);[7] limitations on the amount of notice or payment in lieu of notice that an employee will receive upon his or her termination (i.e. the employer may terminate based on the minimum length of notice set out in the ESA); and a waiver of common law notice. Importantly, the way the employment agreement is entered into by the employee – namely, freely and voluntarily with sufficient time to consider the terms and conditions – is just as important as what it actually says.

Once the working notice has commenced, the dentist employer may choose to offer staff a financial incentive (called "consideration") to waive the remaining notice they are owed to sign the employment agreement. The amount of such an incentive is negotiable and can vary from a few hundred dollars to a few thousand dollars. If the staff rejects the offer, the selling dentist may continue to make offers during the notice period but cannot threaten or force the staff to sign the employment agreement prematurely and without sufficient consideration – otherwise they might be sued for constructive dismissal.

Employment Standards Act, 2000

So far we've been talking about how the common law applies to a seller dentist in the context of an asset sale. What about the minimum standards that dentist employers must abide by under the ESA? Here, Section 9 of the ESA says that, if a purchasing dentist hires the seller's staff after buying the business' assets (and doesn't wait at least 13 weeks after the closing before hiring them), then the staff will be deemed not to have been terminated by the seller. Instead, those staff will be deemed to have been employed with the purchaser the whole time they were actually employed by the seller – and that's in addition to their time working for the purchaser! This can significantly affect the amount of notice or payment in lieu of notice that the purchasing dentist must provide in order to terminate an employee pursuant to the ESA (for the most part, this is one week of notice or payment in lieu of notice per year of service, up to a maximum of eight weeks for eight or more years of service). There is no way to contract out of the ESA, and attempts to do so in an employment agreement could be invalidated.[8]

The Asset Purchase Agreement

When the time comes to sell, the seller's lawyer should try to negotiate a better deal in the asset purchase agreement with respect to staff liability. This would include, for example, rejecting discounts to the purchase price, requiring the purchasing dentist to offer employment to all employees on substantially the same terms as they had at the time of closing, and having the purchasing dentist accept 100 percent of the costs associated with terminating an employee after the asset purchase transaction is completed.

What are the chances of a purchasing dentist accepting such terms? Actually, pretty good if it's a seller's market (as is currently the case in major Ontario cities) and if the practice has been operating on sound principles, has a good location and has lots of growth potential.

Conclusion

Dentists considering selling their practice may need to do some cleanup – particularly if they have long-term staff who haven't signed any proper employment agreements. A professional should introduce those contracts so that the selling dentist doesn't get sued and employee morale doesn't take a big hit. The contracts themselves need to have the right clauses to protect the selling dentist while making the practice look more attractive to a purchasing dentist. Finally, when it comes time to negotiate the asset purchase agreement, the selling dentist should have proper legal representation to ensure that his or her rights are protected and interests are promoted when it comes to staff liability.

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REFERENCES

1. Including even if there is an amalgamation of the purchasing dentistry professional corporation and the target dentistry professional corporation owned by the selling dentist.

2. See *Collier v. Sunday Referee Publishing Co.*, [1940] 2 K.B. 647, [1940] 4 All E.R. 234; *White v. Stenson Holdings Ltd.*, (1983) 1 C.C.E.L. 21 (B.C. S.C.); *David Thompson Motor Inn Ltd. and Prefontaine (Third Parties)]* (1983), 43 B.C.L.R. 340 (S.C.) [1 C.C.E.L. 21]; *Addison v. M. Loeb Ltd.*, (1986), 53 O.R. (2d) 602 (Ont. C.A.); and *Canada (Attorney General) v. Standard Trust Co.*, [1994] O.J. No. 2976 (Ont Ct. – Gen. Div.).

3. This differs from a definite term, such as one year.

4. *See Pascua v. Khul-Schachter,* [2013] O.J. No. 3496. For examples of a court awarding 26 months' notice, see *Hussain v. Suzuki Canada Ltd.* [2011] O.J. No. 6355 and *Keenan v. Canac Kitchens Ltd.*, 2016 ONCA 79. Courts will look at a multitude of factors in determining the appropriate amount of notice at common law – including the employee's length of service, age, experience, training, qualifications, education, seniority, etc. Employees also have a duty to mitigate their damages by searching for and accepting available alternative employment. See *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.). Note that there is no absolute upward limit or cap on what constitutes reasonable notice at common law; generally, only exceptional cases will support a base notice period in excess of 24-26 months. The purpose of such reasonable notice at common law is to give the dismissed staff an opportunity to find other employment. See *McKay v. Camco Inc.* (1986), 53 O.R. (2d) 257 (Ont. C.A.) and *Cronk v. Canadian General Insurance Co.* (1995), 25 O.R. (3d) 505 (Ont. C.A.).

5. [2011] O.J. No. 4940, affirmed by [2012] O.J. No. 3847.

6. Note: some courts may deem an employment agreement with a fixed term but which contains renewal provisions or which are successively terminated and re-commenced over a long period of time as a contract with an indefinite term. See for example *Ceccol v. Ontario Gymnastic Federation,* [2001] O.J. No. 3488 (Ont C.A.).

7. Novation substitutes a new employer to a contract and discharges the former employer to a contract by agreement of all parties. See for example *Strevens v. Lawson Mardon Group Ltd./Lawson Mardon Group Ltée,* [1997] O.J. No. 2663, (Ont. C.J. – Gen. Div.).

8. See *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (Supreme Court of Canada) and *MacDonald v. ADGA Systems International Ltd.*, [1999] O.J. No. 146 (Ont. C.A.).