SBH MANAGEMENT LAWYERS

UPDATE

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EMPLOYER HIT HARD FOR DISCONTINUING DISABILITY BENEFITS SHORTLY AFTER TERMINATION

Landon Young

Employers who only provide the minimum amounts required by employment standards legislation after termination are gambling. Sometimes this approach can result in cost savings, but it can also end in a costly damages and legal costs award as occurred in the case of *Brito v. Canac Kitchens*.

This case cannot be taken lightly, especially as the reasons were written by the late Justice Echlin, a former highly respected employment lawyer and prolific writer on employment law. Justice Echlin described the employer's treatment of a dismissed employee on providing only the minimum payments and benefits continuation required by the Ontario *Employment Standards Act, 2000* (the "ESA") as "cavalier, harsh, malicious, reckless, outrageous and high-handed." Such strong condemnation is unusual in wrongful dismissal cases, even where employers play "hardball."

In this Update I review what went wrong for the employer in this case, the applicable legal principles and what employers can do to protect themselves from similar damages awards.

Brito v. Canac Kitchens

Mr. Olguin worked for Canac Kitchens for over 24 years. He was a Team Leader at the time of his dismissal and was 55 years old.

Canac Kitchens dismissed Mr. Olguin and provided him with termination and severance

pay and continuation of benefits for 8 weeks after his dismissal, as required by the ESA. Mr. Olguin's benefits coverage, including his long-term disability coverage, ceased at the end of these 8 weeks.

Almost 16 months after Mr. Olguin was dismissed he became disabled and could no longer work because of cancer. He underwent a series of surgeries. Although he had found new employment, he did not have disability insurance coverage.

Justice Echlin decided that Mr. Olguin was entitled to reasonable notice under the common law of 22 months. Mr. Olguin's earnings from his new employment were deducted from his award for pay in lieu of notice.

More significantly, Mr. Olguin was awarded around $200,000 in damages, representing the value of the disability benefits he lost because of his dismissal. The logic behind this award is that he would have received disability benefits to age 65 had his coverage remained in place for the applicable period of reasonable notice under the common law.

If this wasn't bad enough for the employer, it was also ordered to pay an additional $15,000 for what Justice Echlin described as its "hardball approach" in providing him with only his ESA entitlements and awarded Mr. Olguin $125,000 in legal costs after a 4 day trial.

Applicable Legal Principles

Employees who do not have a valid contract defining their entitlements upon termination of employment are entitled to reasonable notice of termination under the common law or pay in lieu of such reasonable notice. The common law is 'judge made law,' and this entitlement to "reasonable notice" is not set out in any legislation, such as the ESA.

Where reasonable notice is not provided, dismissed employees can sue for the full value of the compensation they would have earned over the applicable period of reasonable notice as if they were still employed, less any earnings received during that period from new employment.
The courts have considerable discretion in deciding how much notice constitutes "reasonable notice" of termination. The main factors the courts will generally consider are: 1) length of service, 2) nature of the job, 3) age, and 4) re-employment prospects, although other factors can also be considered.

In addition, the courts can award extra damages if an employer has acted harshly or in bad faith in the manner of conducting a termination and the employee has suffered mental distress as a result.

The courts can also award "punitive damages" where the conduct of the employer is considered so offensive or harsh that it believes the employer must be punished in addition to simply being ordered to compensate the employee for his or her losses.

Awards of extra damages against employers for harsh conduct are relatively rare. Rarer still are awards of damages for loss of disability insurance because of termination of such benefits during the common law reasonable notice period, although this is not the first time an Ontario court has made such an award of damages.

The Ontario Court of Appeal did award such damages in the 2006 case of *Alcatel Canada Inc. v. Egan*. However, in that case the applicable disability policy provided that it was the employer, not the insurer, who determined when coverage was to terminate and so the employer could have easily prevented that loss.

Implications for Employers

The *Brito v. Canac Kitchens* case should raise serious concerns for employers. Providing only the ESA minimums on termination is not unusual. Indeed, this by itself would not likely have resulted in much comment at all from the court had Mr. Olguin not become disabled after his dismissal.

The employer could not have foreseen at the time of dismissal that Mr. Olguin would become disabled during the common law reasonable notice period. In fact, this employer had handled a number of other terminations in very much the same way without the same kind of damages awards.

The employer also could have handled the dismissal in exactly the same way and not faced any liability beyond the ESA minimums if it had a valid employment contract with Mr. Olguin that limited his entitlements on termination to the ESA. The courts recognize such contracts, if properly drafted and entered into, and do not condemn employers for using them to limit their exposure to liability.

Also, providing long term disability insurance coverage after the employment relationship has terminated can be difficult and expensive for employers. In the current economic climate, many employers simply cannot afford to provide severance packages with full benefits that approach the lengthy common law notice periods often awarded by the courts.

What Employers Can Do to Protect Themselves

Like it or not, the *Brito v. Canac Kitchens* case should cause employers who typically provide only ESA entitlements upon termination to reconsider their approach. Employers have a number of options that can help eliminate or reduce their risk of exposure to such costly damages awards. These include:

1. Offering packages that exceed the minimum requirements of the ESA in return for the employee signing a release of claims. A properly worded release will prevent a claim later for loss of disability benefits and can also protect against other employment related claims including human rights complaints (**see our earlier Update**).

2. Arranging for continued disability coverage for a period matching the employee's potential common law notice entitlement either with the current provider or another provider. Some insurance companies will continue to provide coverage following dismissal for a premium above the usual rate. There are also companies who provide this coverage specifically for the period of common law reasonable notice, although typically for more than what the coverage would normally cost.

3. Providing actual notice of termination equal to the employee's potential common law notice entitlement. Where, as in in the majority of cases, the employer no longer wishes for the employee to be in the workplace, the employee could be placed on a leave of absence for the duration of the notice period, during which all benefits continue.

4. Entering into employment contracts with employees that limit the employee's entitlements on termination to what is required by the ESA or provide some other entitlement that is less generous than the common law. Such a contract could also explicitly state that the employee will not be entitled to continued disability coverage during the common law notice period. However, employers entering into such contracts with existing employees will have to ensure that they comply with the ESA and the employee receives valuable consideration for signing the contract.

Another, more draconian, option would be to stop providing disability insurance benefits altogether. This would put employees in the difficult position of trying to obtain such insurance on their own, which would be more costly than being part of an employee group. Nonetheless, employers could not be blamed in the current economic climate for trying to avoid the cost and legal complications that can result from disability insurance upon dismissal. Employers should also be mindful that terminating existing benefits may, in some cases, create risk that employees would claim constructive dismissal. Care should be taken to address this.

Each employer should consider on a proactive basis what approach would work best for its organization, depending on its resources, tolerance for risk and employee relations. Gambling

that the employee will just go away after only being provided with ESA minimums could prove costly.

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