
THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

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EMPLOYER LIABLE FOR TERMINATION OF DISABILITY COVERAGE

The Ontario Court of Appeal has held an employer liable for payment of amounts a terminated employee would have received from short term and long term disability coverage (STD and LTD) after becoming disabled during the notice period.

At the time of termination, which was without cause, the employer had provided written notice to the employee that her STD and LTD benefit coverage would terminate at the end of the statutory notice period. Three months following termination, and one week after the expiry of the statutory notice period, but within what the court determined to be the appropriate common law notice period, the employee was diagnosed with a major depressive illness rendering her disabled. She had no STD or LTD coverage.

The court held that the employer had "wrongfully discontinued her coverage prior to the onset of disability" and therefore the employer must be liable for the value of the disability benefits that would otherwise have been payable. This is the case because the employer has an obligation to maintain all compensation, including benefits, during the entire common law notice period. The policy of insurance provided the employer with the right to determine when coverage ended. Therefore, the employer had the ability to maintain coverage during the entire notice period.

Consequently, the employee was entitled to full salary between the date of termination and the date of onset of her disability; amounts which would have been payable under the disability policy during the balance of the notice period (60% of full salary) but grossed up to 86% because the disability benefits would not have been taxable; and all amounts which would have been payable under the disability policy after the notice period up to the end of the disability also grossed up to take into account the adverse tax consequences.

Damages were assessed on the basis of actual loss sustained and not the cost to the employee to purchase replacement coverage; the decision is silent on this mitigation obligation if there is one. Fortunately for the employer in this case the employee was only disabled for a year.

Employers should consider maintaining insurance coverage when possible in order to minimize exposure on this potentially costly issue. Employees will want to consider carefully settlements which do not include continued coverage or pay for replacement coverage. For these obvious reasons, this decision is a very important one for all employers and employees and those advising them. It may affect the almost standard practice of termination of STD and LTD benefit coverage shortly after the termination of employment.

EMPLOYMENT STANDARDS DECISIONS HELD BINDING IN CIVIL ACTION

Parties must be careful in dealing with hearings before the Employment Standards tribunal which are convened when an employee disputes the allegation of dismissal for cause in an effort to secure EI benefits. The findings in that proceeding are increasingly being accepted by the court as binding determinations.

Two cases recently dealt with this point. The EI tribunal determines "misconduct", whereas the court is determining "just cause". However, the Honourable Justice Harvinson Young held that because the facts relied upon in support of both the misconduct and the just cause were identical and the parties were identical, the result should be the same. It was noted that if the employer had not participated in the EI hearing, which it is not obliged to do, it could not be bound by any determination; however, having participated it was bound. Harvinson Young J. declined to find any potential injustice or other reason to justify finding to the contrary and therefore no reason not to apply the doctrine of issue estoppel. The employer was bound by the unsuccessful result.

However, in determining whether the decision of the EI tribunal as to whether an employee was bound to accept another offer of employment from the employer in mitigation, was binding to eliminate the employee's claim for damages for wrongful dismissal the Honourable Madam Justice Lo found it was not. Lo J. concluded that notwithstanding that the ESA officer found that the employer's offer was reasonable, the evidence did not indicate that the compensation was relatively equal; therefore, while for the purposes of EI there might have been an obligation to take the position, there was not the same obligation at common law. The ESA officer's jurisdiction was limited and found not to result in an issue estoppel. She dismissed the employer's motion for summary judgment as a result.

Employers should carefully consider what role, if any, they will take in such proceedings.

JUST CAUSE MAY EXIST WHERE CRIMINAL CHARGE

The Ontario Superior Court of Justice has approved of the termination of an employee charged, with possession of child pornography. Prior to the trial of the civil action, the employee had plead guilty to the charge.

The Court held that a company is entitled to take reasonable steps to protect its reputation, including the promotion of its activities with young people, and that as such the termination was reasonable and with just cause. The Honourable Mr. Justice C.N. Herold, however noted:

"This is not to say that in every case where an employee is charged with or convicted of possessing child pornography, he can be dismissed without notice and without pay in lieu of notice. Just as with almost every other area of law, each case must be considered based on its own unique facts. The degree of responsibility exercised by the employee will be a significant issue. So too will it be necessary to examine the company's notoriety and the degree to which, if at all, its reputation in the community will likely be affected. The question of whether the company equipment was utilized will be important....It may be fair to conclude that [the employee's] claim for compensation [for termination] faces a long hard uphill battle, but the facts must be scrutinized carefully."

Such decisions should be carefully considered and reviewed with legal counsel prior to being affected.

HARASSMENT LEADS TO DAMAGE AWARD OF \$950,000

The British Columbia Supreme Court has awarded an unprecedented damage award to an RCMP officer forced to resign with a major depressive illness brought on by a pattern of continual harassment in the workplace expected to last for the rest of her life.

The court recognized that the Canada Human Rights Act had available remedies which ought to have been sufficient. However, in view of the fact that no complaint had been filed and there was no concern of conflicting results as the time for filing a complaint was expired, and the court exercised its concurrent jurisdiction to determine the case.

It was concluded that the provincial crown was vicariously liable for the actions of harassment, which amounted to a negligent infliction of mental suffering. The court found there was a sufficient causal relationship between the tort and the employee's health problems which were serious and anticipated to be permanent.

She was awarded \$125,000 in general damages, \$225,000 for past wage loss and \$600,000 for anticipated future wage loss.

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