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Employment Notes

"...Egan v. Alcatel Canada Inc. has raised more questions than it has answered about the treatment of disabled employees on termination."

Labour and Employment Group

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COURT OF APPEAL RAISES MORE ISSUES ABOUT TREATMENT OF DISABLED EMPLOYEES

Elizabeth J. Forster

A recent decision of the Ontario Court of Appeal in *Egan v. Alcatel Canada Inc.* has raised more questions than it has answered about the treatment of disabled employees on termination.

Ms Egan worked as a management employee of Alcatel for approximately two years. She was terminated on July 3, 2002 and advised that all of her benefits, including her disability coverage would terminate on September 25, 2002. On October 1, 2002 she began to suffer from depression, and was unable to continue her search for alternative employment. The depression lasted approximately one year. The evidence was clear that during that one year period she was incapable of working.

Ms Egan sued Alcatel for damages for wrongful dismissal and for the disability benefits she would have received but for her termination. The trial judge awarded Ms Egan 9 months' pay in lieu of notice but held that she was not entitled to any damages for loss of disability benefits as to award her both pay in lieu of notice and disability benefits would amount to "double recovery".

The Court of Appeal disagreed. It found that Alcatel was liable for the disability benefits that Ms Egan would have received had she worked through the notice period. (In this case, both the STD and LTD policies provided that Alcatel, and not the insurer, determined when disability coverage was terminated). The court held that coverage was wrongfully terminated by Alcatel, and therefore, Alcatel was liable for the full value of the disability benefits.

However, it also held that Alcatel was not responsible for pay in lieu of notice during the periods that Ms Egan was disabled.

This decision is a departure from the way the courts have previously treated employees who became disabled during the reasonable notice period.

In 1997, the Supreme Court of Canada in *Sylvester v. British Columbia* held that an employee could not recover both disability benefits and pay in lieu of notice in a situation where the employer had a self-insured disability coverage and had been responsible for all premiums. The court, in that case, deducted the disability benefits the employee received during the reasonable notice period from the damages for wrongful dismissal, holding that the parties did not intend that the employee would receive both severance and disability benefits during the reasonable notice period.

Subsequent decisions have limited the scope of the decision in *Sylvester v. British Columbia* to situations where the employer has paid all of the

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premium for disability benefits coverage. For example, in *Skopitz v. Intercorp Excelle Foods Inc.*, the court refused to make any deduction for disability payments as the employee had paid the premiums for the coverage. In *McNamara v. Alexander Centre Industries Ltd.*, the Ontario Court of Appeal held that disability benefits were not deductible where the disability benefits were paid through an independent insurance company, and where the evidence showed that the employee had negotiated a reduced salary in return for the benefits. On the same day, the Court of Appeal issued its decision in *Sills v. Children's Aid Society of the City of Belleville* where it also found that where an employee effectively paid for the benefits, she was entitled to keep the disability benefits in addition to damages for wrongful dismissal.

The Court of Appeal does not explain why it departed from this reasoning in the *Egan* case. One can only wonder then why, in Ms Egan's case, where she had presumably paid the LTD premiums, she was not entitled to the benefit of both the disability benefits and the pay in lieu of notice.

Further, the court does not explain why, if it was of the opinion that to award Ms Egan both severance and disability benefits amounted to double recovery, it did not deduct the disability benefits from the severance. Instead, the court chose to reduce the severance payable to Ms Egan. This in effect gave the employer a financial benefit as a result of Ms Egan's disability. As well, it had the effect of providing employees who are disabled with less financial compensation in the event of termination than their healthy counterparts.

We have clearly not heard the end of this debate. In the meantime, employers are left with the perplexing problem of how to deal with the disabled employee on termination. ■

EMPLOYER ORDERED TO PAY ALMOST $1 MILLION ON ACCOUNT OF EMPLOYEE'S HARASSMENT OF CO-WORKER

D. Barry Prentice

Each province, as well as the federal government, has a statute which prohibits discrimination and harassment in employment. Most progressive employers have adopted the philosophy of this legislation by creating their own anti-harassment policies which are intended to be binding on all of their employees. These policies usually provide a complaint and investigation procedure in an attempt to rid the workplace of such objectionable behaviour. A secondary purpose of these policies is to protect the employer in the event an individual alleges harassment by a fellow co-worker.

At law, the concept of vicarious liability makes an employer responsible for many of the acts of its employees arising during the course of employment. This can include responsibility for the harm done to an individual by an insensitive co-worker who happens to be a bully. As the following case establishes, the liability can be significant.

The Nancy Sulz Case

Sulz was an RCMP officer. Sulz alleged that she was mistreated by her immediate supervisor, Smith. The mistreatment began during her second pregnancy, when she was assigned to perform light duties. The harassment continued until she went on sick leave approximately 2 years later. Sulz alleged that Smith made numerous hurtful and harassing comments and allowed numerous hurtful comments to be made by fellow co-workers, including that she was "screwing the system" by becoming pregnant and taking maternity leave, that she did not "cut the mustard", that she was afraid of the dark, that she would pay dearly for her mistakes

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and that they would "get her" when she returned from leave. Sulz complained to upper management and, although an investigation was conducted, no changes to her work arrangements were implemented.

The impact on Sulz was devastating. She was diagnosed as having a major depressive disorder, lost weight, was unable to sleep, and was constantly on the verge of tears. Ultimately, the Court held that "although there are many other stresses in the plaintiff's life, and although [Sulz] may tend to personalize incidents that others might not, the evidence as a whole shows that the harassment which [Sulz] experienced in 1994 and 1995 was the proximate cause of her depression, which in turn, ended her career in the RCMP." As a result, the Court concluded that Sulz was unlikely to ever work again and assessed her damages at $950,000.00.

Although the RCMP had a harassment policy in place, the Court found that the RCMP did not take adequate steps to prevent the harassing conduct by Smith and that it breached an implied term in Sulz' employment contract to provide a harassment-free workplace. Accordingly, the employer was liable for the $950,000.00 award.

A Lesson for Employers

Having a policy which prohibits harassment is not enough. The employer must actively monitor the workplace and take steps to actively implement the policy in the event it learns of harassing behaviour. These steps should include carrying out a prompt and thorough investigation and making changes to the working relationships where necessary. In appropriate cases, this could include re-assignment, transfer, demotion or termination of an offender in order to ensure that the offensive conduct does not continue or re-occur. The risk is too great to do anything less.

Blaney's employment law group can help you develop an anti-harassment policy. We can also assist you in developing a strategy for investigating any complaints that arise to prevent the type of liability assessed in this case. ■

EMPLOYER BENEFIT OBLIGATIONS CONTINUE PAST AGE 65

Neal B. Sommer

Mandatory retirement of employees at age 65 will no longer be lawful in the province after December 12, 2006 as a result of legislative changes made late last year. The immediate impact of the legislation will be to prohibit employers from relying on an employee's age as justification for termination of employment. Of course, in circumstances where a *bona fide* occupational requirement for mandatory retirement can be established (at any age), it will still be permitted. The legislation may also have an effect on employee benefit plans.

Pensions

Pension plans in Ontario are governed primarily by the *Pension Benefits Act*. This Act has not been amended as a result of the elimination of mandatory retirement. Plans are still required to have a "normal retirement date" which must be on or before the employee's 66th birthday. The "normal retirement date" is not a date on which the employee is compelled to retire, or to discontinue accruing benefits; it is simply the date on which a member is legally entitled to receive actuarially unreduced pension benefits. Members may continue to work past the "normal retirement date".

The accrual of benefits under a plan may be limited by the text of the plan itself, either by limiting the number of years of service which may be accrued, or by establishing the maximum

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benefit payable to members. These "caps" are unaffected by the elimination of mandatory retirement.

Disability Health & Life Insurance Benefits

Currently the *Human Rights Code* specifically permits age-related differential treatment under disability, extended health and life insurance benefit plans, provided that those differences are permitted under the *Employment Standards Act, 2000* ("*ESA 2000*"). Nothing in the statute ending mandatory retirement is intended to change or discontinue that exemption.

Group insurance policies which currently exclude from coverage employees who are age 65 or older, and which otherwise comply with the regulations under the *ESA 2000*, will continue to be permitted.

Workplace Safety & Insurance Benefits

The current age-based limitations on Loss of Earnings benefits (i.e. ending at age 65 for workers who were 63 or younger at the time of injury, or 2 years after the injury for older workers) will continue. There is no intention on the part of the government to have an impact upon the structure of the workers' compensation system.

Currently, workers aged 65 or older make up less than 1% of Loss of Earnings benefit recipients. Though this will inevitably rise as the number of older workers active in the workforce grows, the change in demographics is not expected to have an adverse impact on premium rates.

Early Retirement Incentives

Nothing in the legislation restricts or limits an employer's ability to offer a lawful voluntary program to encourage retirement of employees.

Reminder!

There are less than 10 months remaining until the effective elimination of mandatory retirement. Even though there will be no dramatic impact in the workplace on December 12, 2006, employers should be reviewing the texts of their insurance policies and retirement benefit plans now to ensure that they will continue to promote the goals for which they were first established.

Unionized employers will likely face demands at the bargaining table for enhanced benefits for workers aged 65 or older. As well, there may be pressure on employers to raise service or benefit "caps" in pension plans. An accurate understanding of the contents of those plans will be the best way for an employer to respond to these demands. ■

ONTARIO GOVERNMENT RAISES MINIMUM WAGE

Joanna Carroll

The provincial government has raised the minimum wage in Ontario effective February 1, 2006.

The general minimum wage has been increased to $7.75 per hour. There will be a further increase to $8.00 per hour on February 1, 2007.

Other minimum wage rates have also increased as of February 1, 2006. For example, the minimum wage for students under 18 years old and employed for not more than 28 hours a week will rise from $6.95 to $7.25 per hour and that of liquor servers will increase from $6.50 to $6.75 per hour. ■

Employment Notes is a publication of the Labour and Employment Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific advice, please contact us.

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

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