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PUBLICATION

Employment Benefits and Terminated Employees: The Hidden Peril

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In wrongful dismissal actions, the best outcome for a client is often to be found in settling a case, rather than pursuing it through to trial. This is particularly the case when the former employee has mitigated his or her damages by finding alternate employment.

But what happens when it becomes a brutal game of hardball? The ruling in *Brito v. Canac Kitchens*, an Ontario Superior Court decision from earlier this year, provides a sobering illustration of just how bad it can get. The case is notable not only for the extraordinary ultimate cost to the employer, but also for how it illustrates the hidden dangers of lost disability benefits for an employee terminated without adequate notice.

The plaintiff in this case, Mr. Olguin (Mr. Brito was a co-plaintiff who settled before trial) had been employed by Canac Kitchens for just under 24 years. At the time of his termination in 2003 for organizational reasons, he was 55 years of age, and was employed as a “team leader” earning about $70,000 a year.

On termination, Canac provided to Mr. Olguin the statutory minimum payment under the *Employment Standards Act, 2000* (eight weeks’ termination pay plus just under 24 weeks’ severance pay). Canac continued his benefits for only the eight week period required under the *Act*.

Mr. Olguin was out of work for only two weeks. His new job was with a company in the same industry, but was lower paid and without employment benefits. Up to this point, this would be a rather simple case, with the employment standards payments being sufficient to cover both the period that he was out of work and his wage loss for many months thereafter. In fact, once the matter came to trial, the late Justice Randy Echlin of the Ontario Superior Court awarded a 22 month notice period, which resulted in a payment of only approximately $3,000 for lost earnings

in the first 16 months after mitigation earnings were deducted. Surely that would not be an amount worth going to court over.

But what happened 16 months after his termination is at the heart of the story. Mr. Olguin was diagnosed with cancer and was permanently and totally disabled thereafter. Had he still been employed at Canac, he would have been entitled to both short-term and long-term disability benefits. These would have replaced a substantial portion of his income to age 65.

At the time he became disabled (within the 22 month period subsequently identified by the court), Mr. Olguin had no such benefits.

While we often speak about lost pay in considering wrongful dismissal claims, the actual legal principle involved relates to making the employee "whole" - i.e. putting him in the same position that he would have been had he been given "working notice" by the employer through to the end of the notice period. This has two effects. The first relates to mitigation. If an employee entitled to 12 months' notice finds a new job at the previous wage two months after being let go, the court will only award the two months of lost salary. But benefits are another story, and the same principle means that if benefits are lost as a result of a failure to provide reasonable notice, the employer can be liable for all of the economic harm that results, *even if it extends well past the end of the notice period*.

Justice Echlin found that Mr. Olguin would have received 22 months' notice with benefits, if not for the fact that his employer "consciously chose" the "bare minimum" route. The company gambled that he would both get another job and stay well. At trial, Canac argued that it was up to Mr. Olguin to go out and buy replacement benefits for himself, but the court found that any such argument failed in the absence of proof that it would have been possible for him to obtain comparable coverage on his own. Accordingly, Mr. Olguin was found to be entitled to compensation for all of his lost disability insurance benefits, amounting to well over $150,000 for benefits that he would have received up to trial, plus a further sum of almost $50,000 for the benefits that he would have received up to age 65. As a result, on a $3,000 wrongful dismissal claim, the company was on the hook for over $200,000 for lost benefits.

But it gets worse. As a result of the company's "high-handed" and "outrageous" treatment of Mr. Olguin, further damages of $15,000 were added to the pot, and then came the question of determining legal costs. The trial had been hard fought; large amounts of money were consumed on both sides and the court initially accepted Canac's submission that $90,000 would be an appropriate costs award. This, however, was prior to the court learning that Canac had declined a settlement offer that would have had it pay less to settle the case than the court ultimately awarded. The rules around such offers are a matter for another article someday, but as a result of Canac declining such a reasonable offer and continuing with its aggressive "take-no-prisoners" approach, the costs award against it was increased to $125,000.

OUR LESSONS FOR TODAY

There are really two lessons for an employer to take away from this case. First, from the facts presented, it looks like Canac could likely have settled this case early on (as it appears to have done with seven related claims) for a relatively modest sum that would have provided Mr. Olguin with 22 or maybe even 24 months of wrongful dismissal damages for a fraction of the ultimate cost, as opposed to some $350,000 after trial, and this before paying their own lawyers.

The second lesson is about disability benefits. Where an employer is severing a long-term employee, there is clearly a very real risk of being held responsible for damages resulting from the termination of insurance benefits if they are not extended through the notice period. While more moderate expenses can arise from matters such as short-term hospitalizations and dental care, the profound exposure lies in long-term permanent disability claims. At minimum, an employer needs to be aware of the risk of such a claim developing, and structure its termination offers so that the risk of such a circumstance arising is kept to a minimum. We can assist in developing a suitable approach, possibly by giving working notice and maintaining the employment relationship in place, or by seeing if replacement coverage is available after termination.