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## **Employer On The Hook For Value of LTD Benefits For Terminated Employee To Age 65**

In its recent decision in *Brito v. Canac Kitchens*, the Ontario Superior Court criticized a manufacturer for its “hardball approach” towards a terminated 55 year old, long service production employee who subsequently became disabled during the period of “reasonable notice”. The decision included the award of an amount equivalent to 8 years of LTD benefits!

The employee, a “team leader”, had 24 years of service, earned a salary of about \$71,000 and participated in the company’s health benefits plan, including disability coverage. At termination, the employer provided him only with his minimum statutory entitlement under the *Employment Standards Act* (“ESA”) - in this case, 31.79 weeks termination/severance pay, plus benefits continuation for 8 weeks.

The employee obtained alternate employment in less than 3 weeks, but at a substantially lower salary and no benefits. However, approximately 16 months after his dismissal, he went on sick leave from his new employer after having been diagnosed with cancer. He underwent multiple surgeries and treatments and more were anticipated into the future.

The employee successfully sued for wrongful dismissal, with the Court finding him entitled to 22 months “notice” and as well, entitled to be:

- “made whole” up to the point he went on sick leave - the Court awarded approximately \$5,400.00 to compensate for his reduced earnings during the first 16 months post termination (in arriving at this figure, it took into account the almost 32 weeks pay that had been provided at the time of termination);
- placed in the same position he would have been in had his former employer provided him with 22 months working notice.

The Court found that the employee had become totally disabled 16 months after his termination and that if he had been provided with 22 months working notice, his benefits would have remained in place and thus, he would have been entitled to disability coverage under the employer’s plan. The Court stated the employer “consciously chose not to make alternative arrangements to provide its ... employee with replacement disability coverage but rather, “chose to go the ‘bare minimum’ route” and “gambled he would get another job and stay well. When it lost that gamble, it chose to litigate this matter for over five years”.



The employer argued the employee failed to mitigate his potential losses by purchasing replacement disability coverage. It also argued his coverage would have ended when the “*any occupation*” threshold was reached under the policy. The Court rejected both arguments, stating the employer had failed to discharge the onus upon it to prove its case. Accordingly, the Court also awarded damages of \$195,000 (approx.), representing the value of the employee’s STD/LTD benefits up to the date of trial plus the present value of future LTD benefits up to his 65<sup>th</sup> birthday (at which point such benefits would have ended under the policy).

The Court also awarded \$15,000 “*ancillary damages*” to compensate for the employer’s “*hardball approach*” and its “*cavalier, harsh, malicious, reckless, outrageous and high-handed treatment*” of the employee. As well, there was a substantial costs award.

Clearly, the Court was displeased with the employer’s non-compromising attitude toward the employee even after he had become seriously ill. This case highlights the risks associated with providing only minimal termination packages to employees, especially long term employees, which exclude benefits, or compensation for benefits, beyond the statutory period under the *ESA*, and trusting the matter will be resolved without the employee becoming disabled during the common law notice period. If matters do not unfold in the manner hoped or assumed by the employer, it could face substantial liability. This case illustrates the need for employers to deal with terminations carefully and to fully assess the risks when determining the termination packages it will provide (note: if considering the extension of benefits beyond the minimum *ESA* period, the employer should check first with the insurer to confirm whether such extension is permitted - if it is not, the employer might consider, as an alternative, providing an amount to compensate the employee for the loss of benefits).

*The Human Resources lawyers at Evans, Philp LLP have extensive expertise and experience in dealing with all manner of employment and labour relations matters. We regularly provide advice and representation to employers on a broad range of issues, including matters involving collective agreements, employment contracts, workplace legislation (including but not limited to the Employment Standards Act and the Occupational Health and Safety Act), disability management, matters under the Human Rights Code, risk management and so on.*

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