

Presented to Osgoode Professional Development
Managing and Litigating Motor Vehicle Accident Claims

April 23rd, 2009

Employment Issues in a Disability Context

Presented by:

Adrienne M. Kirsh

416-868-3168

akirsh@thomsonrogers.com



Barristers and Solicitors

Basic Legislated Rights

In Canada, most jurisdictions have stipulated that any contractual term which contravenes the legislated minimums is void.

In Ontario, the *Employment Standards Act, 2000*¹ sets out basic rights of employees:

- General minimum rate of pay: \$9.50/hour
- Payment of overtime: 44 hours/week
- Minimum Notice of Termination: ranging from 1 to 8 weeks

The common law dictates the rest.

¹ S.O. 2000, c.41, as amended

Termination Rights

Once disability issues are superimposed on the termination framework, much of the certainty in the process escapes like air out of a slashed tire.

It is common ground that illness or disability is not intentional and will not justify dismissal for cause. However, an employee's inability to work or to perform the essential duties of his or her employment can give rise to grounds of a sort.

Frustration of Employment Contracts

The incapacity of an employee may be such that the employee is capable of performing his or her obligations, thereby frustrating the contract. The law has struggled with the issue of termination due to disability:

- Section 58(5)(c) of the old *Employment Standards Act*²
- Section 15(1) of the *Charter of Rights and Freedoms*³
- Regulation 288/01, Section 9 of the *Employment Standards Act, 2000*⁴

² R.S.O. 1990, c. E.14

³ Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11

⁴ *Supra* Note 1, O.Reg. 288/01

Disability & Frustration of Contract

- Temporary vs. Permanent – no easy answer
- Marks v. Dartmouth Ferry Commission⁵ - permanent disability on the part of an employee that prevents him or her from fulfilling the functions required by the job equals frustration of the employment contract
- Yeager⁶ dealt with whether a temporary illness or disability lasting for 2 years was sufficient to bring the employment contract to an end:

⁵(1904) 34 S.C.R. 366.

⁶[1984] B.C.J. No. 2722 (BC S.C.)

Disability & Frustration of Contract cont'd

- Did not justify termination as:
 - employee had worked for 30 years
 - employee worked his way up to being second in command
 - employee held a significant amount of stock in the company
 - employee's position was not unique

Disability & Frustration of Contract cont'd

5 factors to consider in determining “permanent disability” leading to frustration:

1. the terms of the contract, including the provisions as to sickness pay;
2. how long employment was likely to last in the absence of sickness;
3. the nature of the employment;
4. the nature of the illness or injury, how long it has already continued and the prospects of recovery; and
5. the period of past employment (i.e. a long-lasting relationship will take longer to destroy than one of short duration).

Disability & Frustration of Contract cont'd

These 5 factors are interrelated and cumulative but not necessarily exhaustive.

The illness need not be 'permanent', in the ordinary sense of the word, to put an end to the employment contract so long as it is of such duration that it constitutes frustration of contract.

Disability & Frustration of Contract cont'd

Wilmot v. Ulnooweg Development Group Inc.⁷ also considered:

- whether the employer is prepared to or can accommodate the absence;
- the employee's past performance i.e. are they a key employee to the organization?

Another factor to consider is the age of the employee – an employee closer to retirement age has a greater expectation of continued employment until his or her retirement.

⁷(2007), 253 N.S.R. (2d) 376

Disability & Frustration of Contract cont'd

The basic test of frustration is whether the employee's incapacity, examined before the dismissal, was of such a nature or appeared likely to continue for such a period that further performance of the obligations in the future would be either impossible or radically different from what had been initially agreed to.

Disability & Frustration of Contract cont'd

In *MacLellan v. H.B. Contracting Ltd.*⁸, the court allowed the permanence of the injury, which was only discovered post-termination, to act as justification for the termination.

Despite this case, the overwhelming majority of case law follows the decision in *Yeager* and the 5 factors laid out therein.

⁸ [1990] B.C.J. No. 935 (BC S.C.)

Duty to Mitigate Damages

What is one's duty to mitigate?

In *Forshaw v. Aluminex Extrusions Ltd.*⁹, the British Columbia Court of Appeal stated,

“The duty to “act reasonably”, in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interests – to maintain his income and his position in his industry, trade or profession.”¹⁰

⁹ (1989), 39 B.C.L.R. (2d) 140, [1989] B.C.J. No. 1527 (BC C.A.)

¹⁰*Ibid.* at p. 6

Duty to Mitigate Damages cont'd

Does this mean you have to take a job offer with your old employer?

- Bimbaum v. Lambda Mercantile Corp¹¹ – failure to mitigate
- Evans v. Teamsters Local Union No. 31¹² - failure to mitigate

The principle of mitigation applies regardless of whether or not the termination is constructive or direct dismissal.

¹¹[1977] O.J. No. 357 (Ont. H.C.J.)

¹²[2008] S.C.J. No. 20

Duty to Mitigate Damages cont'd

Whether or not an employee's duty to mitigate requires acceptance of re-employment with the employer who previously dismissed him/her will depend on what a reasonable employee would have done i.e. an objective inquiry.

Duty to Mitigate Damages cont'd

Factors to consider in the 'reasonable' analysis:

- whether the salary and working conditions are similar;
- whether the work is demeaning;
- whether the personal relationships are acrimonious;
- whether the employee has commenced litigation; and
- whether the offer of re-employment was made while the employee was still working or after they had already left

Deducting Damages for Failure to Mitigate

Manning v. Surrey Memorial Hospital Society¹³:

- CEO of Hospital
- Engaged in campaign to remove members of the hospital's board of trustees and replace them with trustees who would reappoint him
- Court deducted salary he could have earned had he searched for other employment during that time

Tracey v. Atomic Energy of Canada Ltd¹⁴:

- A deduction of 10% was appropriate for employee's failure to mitigate.

¹³ [1975] B.C.J. No. 243 (BC S.C.)

¹⁴ [1997] M.J. No. 432 (Man. Q.B.)

To Deduct or Not to Deduct Disability Benefits

McKay v. Camco Inc.¹⁵:

- Self-funded disability benefits and damages arose from 2 separate and independent rights under the contract:
 - 1) explicitly providing for benefits in the event of disability
 - 2) the implied term that an employee will be given reasonable notice where dismissal is without cause
- Mr. McKay was entitled to both disability benefits and damages, however, they could not be made in relation to the same time period.

¹⁵[1986] O.J. No. 2329 (O.C.A)

To Deduct or Not to Deduct Disability Benefits cont'd

Sylvester v. British Columbia¹⁶:

Mr. Sylvester was dismissed due to restructuring after 19 years of service. Shortly before his dismissal, he fell ill; employer offered him 12.5 months of severance pay with any disability benefits received to be deducted.

- Trial decision – increased notice to 15 months with benefits to be deducted.
- BC Court of Appeal – increased notice to 20 months with benefits not to be deducted (adopted *McKay* but ordered benefits payable in relation to the same time period as severance).
- Supreme Court of Canada - disability benefits paid to disabled employees during the reasonable notice period are deductible from damages in lieu of notice, provided that they are paid pursuant to disability insurance schemes established and paid for by employers.

In contrast to the BCCA, the SCC held that disability benefits and employment contracts were not 2 separate contracts but rather, disability benefits are integral to the employment contract

¹⁶[1997] 2 S.C.R. 315

To Deduct or Not to Deduct Disability Benefits cont'd

Since the *Sylvester* decision, Canadian courts have been chipping away diligently at the deductibility principle. Disability payments are not deductible from damages awards for wrongful dismissal if doing so conflicted with the express terms of the employment contract or if the disability benefit plan at issue was not paid for solely by the employer.

To Deduct or Not to Deduct Disability Benefits cont'd

In 2001 the Ontario Court of Appeal in McNamara v. Alexander Centre Industries Ltd.,¹⁷ clarified that *Sylvester* would not apply in the following 3 circumstances:

1. if there was evidence that the employee provided consideration for some or all of the disability benefits;
2. if it went against the express language of the employment contract; or
3. if the contract was silent and it was determined that the true intentions of the parties would not have been to deduct disability benefits from the damages award.

As recently as December 2008, the Ontario court in Piresferreira v. Ayotte¹⁸ followed both McKay and McNamara in refusing to deduct long-term disability benefits from a damages award on the basis that a third party insurer was administering the benefits, not the employer. The case is under appeal.

¹⁷ [2001] O.J. No. 1574 (O.C.A.)

¹⁸ [2008] O.J. No. 5187 (Ont. S.C.J.)

Conclusion

- The debate continues
- We are left interpreting fact-specific cases for clues
- Unsatisfactory from a legal practitioner's point of view