

EMPLOYMENT ISSUES FOLLOWING A MOTOR VEHICLE ACCIDENT

by Alan A. Farrer, Adam Halioua and Carr Hatch

Thomson, Rogers

GENERAL OVERVIEW

Questions relating to wrongful dismissal, applicable notice periods, mitigation and damages are generally legally well defined and understandable. For the most part, employers have long recognized that getting in front of the wave by proposing a reasonable severance package avoids costly litigation and enhances the morale and productivity of remaining employees. For some reason, once disability issues are superimposed on the framework, much of the certainty in the process escapes like air out of a slashed tire. It is arguable that the legislature ought to consider entering into this field and inserting the certainty that employers and employees crave. However, until that happens or until the law is refined sufficiently to present workable guidelines, we are left interpreting the fact specific cases that have already been decided to seek clues as to what to do with our current problems. The entire process is very unsatisfactory from a legal practitioner's point of view.

TERMINATION RIGHTS GENERALLY

Subject to contracts of employment that explicitly define termination rights, employers and employees are generally bound by the statutory law (in Ontario, the *Employment Standards Act, 2000*) and the common law. Generally speaking, any employee can be terminated at any time with or without cause. Naturally, if an employer has cause, immediate termination may be justified. Absent cause, employers generally have to give reasonable notice (which can be combination of working and other notice) and/or provide payment in lieu of notice. The statute mandates certain minimum requirements; the common law the rest. The case law is sufficiently established that most practitioners can readily agree to a range of applicable notice in any given case and the differences between opposing counsel can usually be resolved through brief negotiation. Often, the most difficult issue to resolve relates to whether or not the terminated employee will be able to mitigate his or her damages within the reasonable notice period or not. Various rules of thumb, conventions and assumptions now sufficiently inform all sides such that resolution of these claims is often not that difficult.

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 doctrine of frustration operates to release parties from their obligations under a contract of employment generally where they are confronted with an unexpected event making it impossible for one of the parties to perform obligations thereunder. In the classic non employment case a war may prevent a shipping company from transporting goods in the particular fashion contemplated when the agreement was entered into.

In employment relationships, the incapacity of an employee may be such that the employee is incapable of performing his or her obligations, frustrating the contract. In fact, in Ontario, Section 58 of the *Employment Standards Act, 2000* denied severance pay to employees who were terminated when the contract was frustrated by illness or injury. The Ontario Court has determined that such a provision might offend the Charter of Rights and this ultimately led to an amendment to the statute.

In determining whether the termination of a disabled employee is justified, one must have regard to whether the disability is classified as temporary or permanent.¹ In *Dartmouth Ferry Commission v. Marks Estate*, the Supreme Court of Canada (“SCC”) found that if a disability is so lengthy that it frustrates the contract, this will amount to just cause for termination.² This position was approved in the 2007 Nova Scotia Court of Appeal decision in *Wilmot v. Ulnooweg Development Group Inc.*³ As a rule of thumb, disabilities of between 18 months to 24 months fall into the range.

The test for determining whether an employee’s disability is of such duration that it constitutes frustration of contract thereby justifying termination was laid down in *Marshall v. Harland*.⁴ The British Columbia Supreme Court, in *Yeager v. R.J. Hastings*, approvingly cited the following factors stated in *Marshall*:

1. the terms of the contract, including the provisions as to sickness pay (i.e. does the disability make a return to work impossible or radically different from the obligations undertaken in the employment contract?);
2. how long employment was likely to last in the absence of sickness (i.e. was employment expected to be only short-term?);
3. the nature of the employment (i.e. is the employee’s position unique such that it must be filled quickly?);

¹ David Harris, *Wrongful Dismissal* (Toronto: Carswell, 2008) at p. 3-123.

² (1904), 34 S.C.R. 366.

³ (2007), 253 N.S.R. (2d) 376 [*Wilmot*].

⁴ [1972] 1 W.L.R. 899, [1972] 2 All E.R. 715 (U.K.) [*Marshall*].

4. the nature of the illness or injury and how long it has already continued and the prospects of recovery (i.e. the greater the degree of the injury and length of time it has lasted or is likely to last, the more likely it is that the relationship has been terminated); and
5. the period of past employment (i.e. a long-lasting relationship will take longer to destroy than one of short duration).⁵

Effectively, *Yeager* laid out the basic test as being, “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.”⁶ Thus, whether or not incapacity will be deemed frustration of contract depends in part on the relationship between the duration of the incapacity and the duration of the contract.⁷

In *Yeager*, the court found that though the disability had lasted for two years, it did not justify termination.⁸ This finding was based on the court’s determination that this contract was intended to be long-term, as the employee had worked for thirty years and held a significant amount of stock in the company. In addition, his position was not unique and therefore the employer did not need to fill the position immediately in his absence.⁹

In *Yeager*, at the time of termination, the employer received an improper diagnosis as to the permanence of the employee’s disability (i.e. it believed the employee would never improve, yet, he did improve post-termination). The court held that the test to be applied is not the state of the knowledge at the time of termination but the subsequent final outcome.¹⁰

The British Columbia Supreme Court in *MacLellan v. H.B. Contracting Ltd.* upheld a termination as being justified on the basis that at the time of the dismissal facts existed that justified the termination.¹¹ In *MacLellan*, the company terminated an employee due to financial reasons. MacLellan had been away from work due to an ankle injury but this was not the reason for termination at the time. Nevertheless, the court allowed the permanence of the injury, which was only discovered post-termination, to act as justification for the termination.

⁵ [1984] B.C.J. No. 2722 (BC S.C.) [*Yeager*].

⁶ *Supra* Note 1 at p. 3-125 and 3-126.

⁷ *Ibid.* at p. 3-124.

⁸ *Supra* Note 5 at para. 94.

⁹ *Ibid.* at para. 88.

¹⁰ *Ibid.* at p. 3-127.

¹¹ [1990] B.C.J. No. 935 (BC S.C.) [*MacLellan*].

Despite this case, the overwhelming majority of case law follows the decision in *Yeager*, and more importantly, the factors as laid out in *Marshall*.¹²

DUTY TO MITIGATE DAMAGES

In *Forshaw v. Aluminex Extrusions Ltd.*, the British Columbia Court of Appeal stated that although the duty to mitigate is a duty to take reasonable steps to obtain equivalent employment elsewhere and accept such employment if available, it is not an obligation owed by the dismissed employee to the former employer to act in the employer's interests.¹³ The court further 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.”¹⁴

Strictly speaking, the duty to mitigate begins at the date of termination; however, the courts acknowledge that dismissed employees require time to regroup before they can be deemed to be failing in their duty to search out alternate employment. Thus, the courts afford a “reasonable adjustment period”.¹⁵

The duty to mitigate can in certain circumstances lead an employee to return to the employer from whom he/she was wrongfully dismissed. If an employee is offered substantially similar employment to that from which he or she was dismissed, the duty to mitigate does oblige him/her to accept the same, unless the relationship between the parties is so poor that further employment would be intolerable.¹⁶ In *Birnbaum v. Lambda Mercantile Corp.*, it was found that the dismissed employee's refusal of re-employment in substantially the same position as prior to dismissal with the same employer constituted a failure to mitigate and, therefore, damages were denied as from the date of the offer.¹⁷ Furthermore, if the failure to mitigate is not due to a general lack of effort but rather to a dismissed employee's reluctance to accept a specific job offer, the employee's entitlement to damages will cease as of the date of the job offer.¹⁸

¹² *White v. F.W. Woolworth Co.* (1996), 139 Nfld. & P.E.I.R. 324; *Demuyne v. Agentis Information Services Inc.*, 2003 BCSC 96; *Deyonge v. Liberty Mutual Insurance Company* (2003), 25 C.C.E.L. (3d) 27; and *Wightman Estate v. 2774046 Canada Inc.*, 2006 BCCA 424.

¹³ (1989), 39 B.C.L.R. (2d) 140, [1989] B.C.J. No. 1527 (BC C.A.) at p. 6 [*Forshaw*].

¹⁴ *Ibid.*

¹⁵ *Supra* Note 1 at p. 4-276.

¹⁶ *Ibid.* at p. 4-275.

¹⁷ [1977] O.J. No. 357 (Ont. H.C.J.) at para. 16-17.

¹⁸ *Valentine v. Pacific Rim Ready Mix* (1981), 9 A.C.W.S. (2d) 449; and *Farrugia v. Wabco – Standard Inc.*, [1984] O.J. No. 409 (H.C.).

More recently, the SCC dealt with the issue of whether the duty to mitigate compelled an employee to return to the employer from which he was wrongfully dismissed if offered similar employment in *Evans v. Teamsters Local Union No. 31*.¹⁹ The SCC found that the duty to mitigate does require an employee to accept re-employment even following express dismissal, provided the parties after the dismissal have a relationship that makes this a reasonable prospect.²⁰ 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 reasonableness.

With respect to the general issue of an employee's failure to mitigate limiting damages, the onus is on the employer to demonstrate that the employee had failed to make reasonable efforts to find work and that work could in fact have been found.²¹ No deduction will be made from the damages award if the employee would not have been able to find work even if he had made reasonable efforts to find same.²²

On the whole, where the court finds that an employee failed to mitigate his/her damages, it may deduct from the damages award the amount it believes the employee could have earned in the intervening time period.²³ In *Manning v. Surrey Memorial Hospital Society*, the dismissed employee was the Chief Executive Officer of the defendant hospital.²⁴ The hospital's basis for dismissal was that Manning had not ensured the accounting books were adequately kept, despite numerous warnings. For 3 months following her dismissal, Manning engaged in a campaign to remove members of the hospital's board of trustees and replace them with trustees who would reappoint her. During this period, Manning did not seek out alternate employment. As a result, the court held that it would be reasonable to conclude she could have earned \$1,500.00 during this period and accordingly deducted this amount from her damages award.²⁵ This approach was also used by the Manitoba court in *Tracy v. Atomic Energy of Canada Ltd.*, wherein the court estimated that a deduction of 10% would be appropriate for the failure to mitigate.²⁶

DISABILITY PAYMENTS

The Ontario Court of Appeal ("OCA") dealt with whether disability payments should be deducted from employees damages awards in *McKay v. Camco Inc.*, wherein, an employee had suffered injury after already having received notice of

¹⁹ 2008 SCC 20, [2008] S.C.J. No. 20 [*Evans*].

²⁰ *Ibid.* at para. 28.

²¹ *Ibid.*

²² *Abbott v. International Longshoremen's Association* (1977), 18 Nfld. & P.E.I.R. 335.

²³ *Supra* Note 1 at p. 4-298.

²⁴ [1975] B.C.J. No. 243 (BC S.C.) [*Manning*].

²⁵ *Ibid.* at para. 7.

²⁶ [1997] M.J. No. 432 (Man. Q.B.) at para. 47.

the pending termination.²⁷ The company had a self-funded disability plan, which provided for the employee to receive his full salary until a certain point, and from then on he would receive two-thirds of his salary. The OCA found that the purpose of requiring a reasonable notice period is to afford dismissed employees the opportunity to seek out alternative employment, but as disabled employees often cannot seek out employment, disability payments received during this period cannot be set-off against damages.²⁸ The OCA specifically stated,

“If disability payments were deductible from damages for the wrongful dismissal, the right of the appellant to reasonable notice would be completely frustrated because he could not have exercised it to search for employment while he was disabled.”²⁹

The SCC faced a similar issue in *Sylvester v. British Columbia*.³⁰ The SCC found that 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 by employers.³¹ Where disability benefits are intended to be a substitute for income, an employee should not be entitled to receive salary and disability benefits at the same time, accordingly, in such circumstances, disability benefits should be deducted from the damages award.³² Where the employment contract fails to indicate otherwise, an employee who is dismissed when he/she is not working but receiving disability benefits and an employee who is working when he/she is dismissed should receive equal treatment.³³

As made clear in *Sylvester*, the rule that disability payments are deductible from the damages award for wrongful dismissal would not apply 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.³⁴ In a subsequent decision of the OCA, *McNamara v. Alexander Centre Industries Ltd.*, it was found that *Sylvester* would not apply in the following 3 circumstances:

1. if there was evidence that the employee provided consideration for the disability benefits;
2. if it went against the express language of the employment contract; or

²⁷ (1986), 53 O.R. (2d) 257, [1986] O.J. No. 2329 (O.C.A.) [*McKay*].

²⁸ *Supra* Note 1 at p. 3-118.

²⁹ *Supra* Note 31 at para. 41.

³⁰ [1997] 2 S.C.R. 315 [*Sylvester*].

³¹ *Supra* Note 1 at p. 3-118.

³² *Supra* Note 34 at para. 17.

³³ *Ibid.* at para. 20.

³⁴ *Supra* Note 1 at p. 3-119.

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.³⁵

In *McNamara*, the court found that as the long-term disability benefits were paid by an insurer and not by the employer itself, there was no concern that the employer would have to pay twice for the same period of time. Therefore, disability benefits should not be deducted from the damages award.³⁶

Recently, the Ontario court followed both *McKay* and *McNamara* in refusing to deduct long-term disability benefits from a damages award on the basis that the third party insurer was administering the benefits, not the employer.³⁷

THE DUTY TO ACCOMMODATE UNDER THE ONTARIO HUMAN RIGHTS CODE

The “duty to accommodate” places a duty upon an employer to adjust the workplace for employees, protected under human rights legislation, by providing them with an equal opportunity to perform a job for which he or she is otherwise qualified, but for their disability. The Ontario *Human Rights Code* states: “Every person has a right to equal treatment with respect to employment without discrimination because of...disability.”³⁸ Employers and their employees are not permitted to contract out of the provisions of the Code.³⁹ Accommodation includes adjustments such as an employer’s tolerance for some degree of absenteeism, movement to other jobs within a company, rehabilitation services, and the option of reduced hours for work.

Our courts have divided discrimination in the workplace into the categories of direct discrimination and adverse effect discrimination. In *Ontario (Human Rights Commission) v. Simpson-Sears*, the Supreme Court of Canada stated that direct discrimination takes place where an employer adopts a practice or rule which discriminates on its face on a prohibited ground. Adverse effect discrimination arises where an employer adopts a rule or standard which is neutral on its face and applies equally to all employees, but has a discriminatory effect on an employee or group of employees because of a special characteristic they possess. Both forms of discrimination are actionable.⁴⁰

Adverse effect discrimination is covered under the Ontario *Human Rights Code* and, if found, the employer has a duty to reasonably accommodate the employee to the point of undue hardship.⁴¹ The employer must take such steps as may be

³⁵ (2001), 53 O.R. (3d) 481, [2001] O.J. No. 1574 (O.C.A.) [*McNamara*].

³⁶ *Ibid.* at para. 22.

³⁷ *Piresferreira v. Ayotte*, [2008] O.J. No. 5187 (Ont. S.C.J.) at para. 251 [*Piresferreira*].

³⁸ R.S.O. 1990, c. H.19.

³⁹ *Etobicoke (Borough) v. Ontario (Human Rights Commission)*, [1982] 1 S.C.R. 202.

⁴⁰ [1985] 2 S.C.R. 536.

⁴¹ *Ibid.* at pp. 552-5.

reasonable to accommodate without undue interference in the operation of the business and without undue expense.⁴² The employer must show, where they did not accommodate, that the impact was considered and that there was no reasonable alternative short of causing undue hardship.⁴³ The employer needs to show that a “genuine effort to accommodate an employee,”⁴⁴ was made, consistent with the type of work for which the employee was hired, and that more than a mere “negligible effort”⁴⁵ was undertaken. The employer must also show that there was a rational connection between the discriminatory rule or standard and the actual performance of the job.⁴⁶

Though there is not a specific test for the duty to accommodate up to the point of undue hardship, relevant jurisprudence has suggested that costs, disruption of collective agreements, employee morale, and interchangeability of the workforce, are all factors that should be considered in assessing whether an employer has fulfilled their duty to accommodate a disabled employee.⁴⁷

**ALAN A. FARRER
ADAM HALIOUA
CARR HATCH**



3100-390 Bay Street
Toronto, Ontario
M5H 1W2
(416) 868-3100
www.thomsonrogers.com

September 30, 2010

⁴² *Ibid.* at pp. 555.

⁴³ [1992] 2 S.C.R. 970.

⁴⁴ *Holmes v. Canada (Attorney General)* (1997), 130 F.T.R 251, at para. 34.

⁴⁵ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

⁴⁶ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU (“Meiorin”)*, [1999] 10 W.W.R. 1 (S.C.C.).

⁴⁷ James A. D’Andrea, “Illness and Disability in the Workplace” (September 2009) Canada Law Book at 4-119.