Severance and the Disabled Employee – *Egan v. Alcatel Canada Inc.*

Arleen Huggins
Koskie Minsky LLP

9th Annual Six-Minute Employment Lawyer

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING LEGAL EDUCATION

Severance and the Disabled Employee – *Egan v. Alcatel Canada Inc.*

INTRODUCTION

One of the most difficult areas of employment law to grapple with is the issue of employee disability and specifically, what liability issues arise when an employee becomes disabled after the termination of his or her employment.

In Ontario, sections, 60-62 of the *Employment Standards Act,* 2000, S.O 2000 c.41(the "Act") provide that:

> "60.(1) During a notice period under section 57 or 58, the employer,
>
> (a) shall not reduce the employee's wage or alter any other term or condition of employment;
>
> (b) shall in each week pay the employee the wages the employee is entitled to receive, which in no case shall be less than his or her regular wages for regular work week; and
>
> (c) shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period.
>
> ....

(3) If an employer fails to contribute to a benefit plan contrary to clause 1(c), an amount equal to the amount the employer should have contributed shall be deemed to be unpaid wages for the purposes of section 103.

(4) Nothing in subsection (3) precludes the employee from an entitlement that he or she may have under a benefit plan.

61. (1) An employer may terminate the employment of an employee without notice or with less notice than is required under sections 57 or 58 if the employer,

(a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and

(b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive.

....

62. (1) If an employer terminates the employment of employees without giving them part or all of the period of notice required under this Part, the employees shall be deemed to have been actively employed during the period for which there should have been notice for the purposes of any benefit plan under which entitlement to benefits might be lost of affected if the employees cease to be actively employed.

(2) If an employer fails to contribute to a benefit plan contrary to clause 61(1)(b), an amount equal to the amount the employer should have contributed shall be deemed to be unpaid wages for the purpose of section 103.

(3) Nothing in subsection (2) precludes the employee for an entitlement he or she may have under a benefit plan.

The above provisions of the Act have been interpreted so as to continue an employee's entitlement to disability insurance coverage during the statutory minimum termination period (the "statutory notice period"), whether or not they are actively at work. This has resulted in most insurers in Ontario amending their disability policies to provide specific language deeming active employment to include the statutory notice period, or alternatively, to include the proviso that benefit coverage is to be extended "as required by law", such that disability coverage continues to the end of the minimum termination period prescribed by the Act.

However, most disability policies will not permit disability coverage to continue after that date, creating difficult issues for both employees and employers to deal with when addressing the common law notice period.

Furthermore, many provinces, such as Saskatchewan, Manitoba, Quebec, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland, Yukon and Nunavut do not have statutory provisions maintaining benefit plan entitlement during the statutory notice period and correspondingly, most insurers' disability provisions in those provinces will not allow the continuity of disability coverage after an employee's last date of active employment.

As a result, a terminated employee who becomes disabled in Ontario after the statutory notice period ends but before the end of the common law notice period (or where the terminated employee becomes disabled after active employment ceases in a federal undertaking or in those provinces which do not contain provisions similar to the Ontario Act provisions described above), may well sue the employer for damages equal to the disability payments which otherwise would have been paid by the insurer.

The recent Court of Appeal of Ontario case of *Egan v. Alcatel Canada Inc.* (2006) 47 C.C.E.L. (3d) 87, released on January 10, 2006, has spoken directly on the issue and has held an employer liable for disability benefits under those circumstances.

PRE *EGAN V. ALCATEL CANADA INC.*

Arguably, prior to the case of *Egan v. Alcatel Canada Inc*, a Court of Appeal had not dealt squarely with the issue of an employer's liability for disability payments when the employee had only become disabled during the common law notice period.

1. ***Prince v. T. Eaton Co.***

In *Prince v. T. Eaton Co.* (1992) 41 C.C.E.L. 72, The British Columbia Court of Appeal dealt with a case where six employee plaintiffs were given notice of termination for economic reasons on January 28, 1983, to be effective March 25, 1983.

Each of the employees had long standing service. One of the employees had become disabled subsequent to the last date of active service and claimed against the Defendant employer for a

declaration of entitlement to benefits under the employer's group sickness, salary continuance and long-term disability income plan from July 1, 1983, or in the alternative, damages.

In this case, at the time of the employee's termination, the employer was self-insured for salary continuance (short-term sickness/disability) and long-term disability coverage and the premiums were fully paid for by the employer.

The employer refused to recognize the employee's claim for disability benefits and defended principally on the basis that the employee's disability arose after he ceased to be an employee on March 25, 1983, and that the employee's entitlement to benefits under the plan terminated on that date.

Mr. Justice Lysyk of the lower Court found that the employee was totally disabled within the period of reasonable notice and held him to be entitled to the declaration he sought.

On appeal by the employer, the British Columbia Court of Appeal held that a "dismissed employee whose employment is terminated wrongfully is entitled to compensation for loss suffered as a result of the deprivation of fringe benefits." (page 80).

It then found that the circular and other employer benefit documents which came into force after the employer had become self-insured, amended the prior third party group insurance policy which had provided that an employee was no longer insured when he or she ceased active employment. The employer's self-insured benefits documents provided benefits would cease with the "termination of employment". Relying upon the Supreme Court of Ontario's decision in *McDonald v. Lac Minerals Ltd, [1987] O.J No. 1216* (September 25, 1987), the Court of Appeal

interpreted "termination of employment" to be a "lawful termination of employment", being at the end of the reasonable notice period. (pages 85-86).

Further, the Court of Appeal relied upon the British Columbia Court of Appeal decision in *Nygard International Ltd. v. Robinson (1990) 46 B.C.L.R. (2d) 103* to state at page 86 that:

> "When a contract is repudiated and the innocent party accepts the repudiation...the contract remains alive for the purpose of assessing the compensation to be paid. That compensation, that is to say, damages for the breach are what the innocent party would have received or earned depending upon the nature of the contract had it been performed according to its terms".

The Court of Appeal held that where a contingency, namely total disability, has actually occurred within the notice period and has triggered the employee's entitlement to disability benefits, damages on the basis of the loss of the benefits themselves will be awarded.

The British Columbia Court of Appeal therefore allowed the appeal in order to grant a declaration that the Plaintiff was entitled to damages to be assessed for loss of disability benefits under the employer's plan in order to clarify that the employee was not entitled to an annuity until age 65, but rather an assessment of the present value of the loss of income stream analogous to the assessment of damages for personal injury. In that sense, the Court of Appeal did not limit the damages to the disability benefits which the employee would have received during the 42 week notice period. As the matter was then remitted to the trial judge for final calculations, it is unclear whether the Court ultimately reduced the payments for any mitigation income earned with the employer or any subsequent employer.

Since *Prince v. T. Eaton Co.,* employers' counsel have argued that this case should be confined to its facts; being an employee's claim for breach of a disability contract as against an insurer which was also the employer.

It can be argued that *Prince v. T Eaton Co.* stands for nothing more than damages being awarded against an employer for the employer's breach of the terms of a benefit plan, which on its particular terms, entitled an employee to continue disability coverage during the common law notice period.

2. ***Pioro v. Calian Technology Services Ltd.***

The Ontario Superior Court of Justice dealt directly with the obligations of an employer to an employee who becomes disabled after termination during the common law notice period in *Pioro v. Calian Technology Services Ltd.* (2000) 48 O.R. (3d) 275.

Unlike *Prince v. T. Eaton Co.* the disability policy at issue was through a third party insurer and paid for by the employee. It also provided that coverage ended upon the cessation of active full-time employment, except as required by law.

The notice of termination issued to the employee on July 29, 1997 offered the employee 30 weeks' notice. The employee rejected the offer. In December, 1997, the employee suffered chest pains and was diagnosed with myocardial ischemia and unstable angina. He was also diagnosed with depression.

The employee sued for wrongful dismissal and claimed, in addition, an entitlement to long-term disability benefits on the basis that he had become totally disabled during the notice period.

It is interesting to note that the employee argued that the employer had elected not to purchase long-term disability insurance which would have continued to provide coverage after the actual termination of employment and selected the less expensive coverage without first advising the employee.

Expert evidence was given at the trial that the disability policy in issue was an average employer/employee benefit contract, not dissimilar to many seen in the industry, and consistent with industry standards. It was also the evidence of the expert that at the time, the insurer did not offer any policies allowing for conversion of LTD benefits after termination.

The Court held that the reasonable notice period was 22 months and found that the employee had become totally disabled in April, 1998 and remained totally disabled to the time of trial.

The Court went on to state that there was no obligation on an employer to provide actual work to an employee as it could elect to keep the employee on payroll without having the employee attend work. It found as a fact that the employer had no work to be performed by the employee during the notice period due to the plant closure, and that therefore, under the terms of the disability policy, the employee would not have been entitled to LTD coverage. As a result, the Court found that the employee had no claim against his employer for disability benefits.

The Court distinguished *Prince v. T. Eaton Co.* on its facts on the basis that in that case, the self-funded disability coverage provided that benefits would cease upon termination of employment, being a lawful termination of employment, while in *Pioro v. Calian Technology Services Ltd.* the policy provided that coverage ceased upon active full-time employment.

The decision in *Pioro v. Calian Technology Ltd.* appears to have been decided on the particular facts of the plant closure and the finding by the Court that the employer was unable (as opposed to unwilling) to provide the employee with active work during the notice period in order to keep the LTD coverage intact.

By inference then, the case suggests that had the employee been terminated without cause for reasons other than lack of work, and had the employer been able to provide continued active employment during the notice period, the employee would have been successful in his damage claim for disability benefits.

3. ***Held v. Stelco Inc.***

Approximately 5 years after *Pioro v. Calian Technology Ltd.* the issue arose once again in *Held v. Stelco Inc., a* July 13, 2005 decision of a Claims Officer of the Ontario Superior Court of Justice (Commercial List) appointed by an Order of Justice Farley to asses individual creditor claims against Stelco Inc. and related companies under the *Companies' Creditors Arrangement Act,* R.S.C 1985 c.C-36 (the "CCAA").

The employee's claim was for wrongful dismissal after having been terminated on September 13, 1996 following 13 years of employment for excessive absences due to illness, being fibromyalgia and resulting depression. The employer terminated disability benefit coverage at the end of September, 1996, even prior to the expiry of the statutory notice period.

The employee rejected an offer of severance and instead commenced an action on July 4, 1997 for reinstatement and damages. By August 1997, the employee was assessed as totally disabled.

Stelco defended the action on the basis of just cause, being the employee's persistent absenteeism, but abandoned that position shortly before the hearing.

The Monitor appointed under the CCAA assessed the reasonable notice period at 12 months, ending one month after the disability commenced, and awarded damages for loss of benefits at 10% of the wrongful dismissal award. The Monitor did not award the employee damages for loss of the disability payments themselves.

The Claims Officer did not adjust the period of reasonable notice, but allowed the appeal in respect to the disability benefits. In allowing the employee's appeal in respect to the disability benefits claim, the Claims Officer did not refer to any of the cases referenced to above in this paper, but instead relied upon the general principles of employment damages as enunciated in the Ontario Court of Appeal decision in *Taylor v. Brown [2004] O.J. No 4650.*

In *Taylor v. Brown,* the Court stated at paragraph 15 that:

> "Proper notice of termination is an implied term of the contract of employment; payment in lieu of notice is not...payment in lieu of notice is seen as 'an attempt to compensate for [the employer's] breach of the contract of employment, not as an attempt to comply with an implied term of the contract of employment.' The quantum of a payment in lieu of notice, therefore, is not calculated in accordance with the terms of the contract, but rather is a means by which an employer may terminate an employee contrary to its common law duty to give reasonable notice of termination, without incurring any liability."

The Claims Officer held that as there was no acceptance by the employee of the employer's pre-assessment of damages on account of the employer's breach of the employment contract, Stelco

remained liable for any damages arising from its failure to give working notice. The Court held that had reasonable working notice been given, the employee would have most probably remained at work at Stelco until she was hospitalised on August 11, 1997 and would have received the disability benefits provided under the disability plan.

The employer's argument that it was not appropriate for the Claims Officer to order it to pay any monies that would ordinarily come from a third party insurer, was not successful. The Claims Officer emphasized that it was the employer, not the insurer, who breached the employment contract and ordered Stelco to pay all disability payments owed up to the date of the hearing and the present cash value of payments to which the employee would be entitled to age 65. From the damages assessed, the Claims Officer deducted the mitigation income from Stelco and others.

Again, in making its decision, the Claims Officer appears to put significant reliance upon the fact that Stelco could have allowed the employee to attend work during the notice period which would have entitled the employee to disability benefits under the third party insurance policy.

There is some question as to whether the Claims Officer's decision holds the same status as a Judge's Order, however in any event, it would at best be binding as a decision of the Ontario Superior Court of Justice.

EGAN v. ALCATEL CANADA INC.

In the recent decision of *Egan v. Alcatel Canada Inc,* released on January 10, 2006, the Court of Appeal for Ontario dealt with the issue directly. In this case, an employee had been employed for less than 21 months in a senior management position when her employment was terminated without cause on July 3, 2002 as part of a mass termination. Upon termination, the employee

was paid approximately 12 weeks salary for statutory notice and severance in accordance with the *Employment Standards Act,* 2000. In the letter of termination the employee was advised that her short-term and long-term disability benefits would end at the end of the statutory notice period.

The employee thereafter became disabled as at October 1, 2002, three months following her termination, due to a major depressive disorder and remained disabled until October 1, 2003.

The trial Court found that the employee had been induced to join the Defendant employer from secure employment of 20 years with a previous employer and established the reasonable notice period to be 9 months, which finding was upheld on appeal.

The employee had cross-appealed the trial Judge's decision not to award her disability benefits during the notice period because of his finding that she was left "whole" by his award of damages representing her full salary for the entire reasonable notice period of 9 months. The employee appealed on the basis that she should have been awarded disability benefits in addition to damages for wrongful dismissal. The Court of Appeal allowed the employee's cross-appeal, but significantly altered the manner of calculating the damages, as discussed below.

The Court of Appeal found amble support for the trial judge's finding of fact that had the employee been given working notice in the amount which the Court established to be reasonable, the disability coverage would have been in effect when she became disabled and would have entitled her to disability benefits throughout her period of disability.

The Court of Appeal went on to state further that the employee's application to the third party insurer for short-term and long-term disability benefits was rejected on the basis that her coverage had ceased "because Alcatel had cancelled her coverage prior to the expiry of her period of reasonable notice". (page 95).

Specifically, the Court of Appeal found as a fact that the disability policies provided that Alcatel, and not the insurer, "determines" when coverage is terminated, and that Alcatel wrongfully discontinued the employee's coverage during the reasonable notice period, and therefore was liable for the resulting loss. As stated by the Court of Appeal at page 95:

> "Where an employee would otherwise have qualified for disability benefits during the reasonable notice period, but the application is denied on the basis that coverage was wrongfully discontinued by the employer, the employer must be liable for the value of the disability benefits that would otherwise have been payable".

On that basis, the Court of Appeal determined that the employee was entitled to damages for the disability benefits and that the trial judge had erred in awarding the employee her full salary for the entire notice period. The Court of Appeal therefore proceeded to adjust the damages awarded to the employee at trial to take into consideration that the employee was "overpaid salary" and "underpaid disability benefits". (pages 95-96)

Relying upon the Supreme Court of Canada's decision in *Sylvester v. British Columbia* (1997) 146 D.L.R. (4th) 207, the Court of Appeal agreed with the trial judge that it could not be inferred that the parties intended that the employee would be entitled to receive both damages for wrongful dismissal and disability benefits, and that an employee, upon going on disability

benefits, is no longer entitled to his or her salary for the period of disability. The Court of Appeal therefore adjusted the trial award to:

(i) award the employee her full salary from July 3, 2002, the date of termination, to October 1, 2002, the date of the onset of disability;

(ii) award the employee the quantum of disability benefits which the employee would have received under the short-term disability policy from October 1, 2002 to January 23, 2003, grossed up to compensate the employee for tax (as the disability benefits were payable on a non-taxable basis). This resulted in a payment, before tax gross up, which was less than the employee's full salary, as the benefits were payable based on 60% of regular salary;

(iii) award the employee the quantum of disability benefits which the employee would have received under the long-term disability policy from January 28, 2003 to October 1, 2003, the date of her recovery (as opposed to the end of the notice period); a payment again based upon 60% of the employee's regular salary; and

(iv) reduce the amounts awarded for lost benefits and lost group RSP/DPSP employer contributions, restricting them to the period of July 3, 2002 to October 1, 2002, during which the employee received her regular salary.

By making the above adjustments, the Court of Appeal increased the damage award to reflect the difference in tax implications of a wrongful dismissal award as compared to an award for non-taxable disability benefits.

In *Egan v. Alcatel,* as in *Pioro v. Calian Technology Services* and *Held v. Stelco Inc.,* the Court of Appeal focuses on the employer's act of cancelling coverage during the notice period, but appears not to engage in the type of discussion as was held in the two other cases referenced above concerning whether the employer had the option of allowing the employee to attend work during the reasonable notice period such that coverage could have been maintained, or whether the employer could have arranged with the disability insurer to continue coverage notwithstanding that the employee ceased active service.

While the Court of Appeal in *Egan v. Alcatel* stated that Alcatel, and not the insurer, "determines" when coverage is terminated, in this case, given the mass termination, it is unclear whether there was any work available for the employee to continue in order to maintain active service during the notice period, which would seem to have been the *Pioro v. Calian Technology Services* scenario.

The decision in *Egan v. Alcatel* makes clear that an employer will be held to be a disability insurer in the event that an employee becomes disabled during the notice period for as long as the disability continues (and arguably in some cases beyond the disability ending based upon present value calculations as was done in *Held v. Stelco Inc.*).

While the intent of the decision is of course to assist employees who have been terminated without notice, one has to question whether this decision will act as a deterrent to employers to carry group disability insurance for their employees at all, which would thereby oblige each employee to purchase their own disability policy at an increased cost.

The above decisions have meant that when advising employers who do not have, and cannot obtain, disability coverage which continues after active service ceases (i.e during the reasonable notice period) on **any** termination of employment of an employee where actual working notice is not being provided for the full reasonable notice period, it is necessary to:

(i) advise the employer as to the legal liability relating to a terminated employee becoming disabled during the reasonable notice period;

(ii) determine from the employer whether the employee to be terminated has any health issues, and investigate whether such health issues may be of a nature to transcend into a total disability during any reasonable common law notice period such that the employee would be entitled to either short-term or long-term disability coverage;

(iii) ensure that the employer requests, in writing, that the disability insurer maintain coverage for the employee during the common law notice period, notwithstanding that the terms of the policy may require "active service";

(iv) consider offering payment at or in excess of reasonable notice in consideration for a full and final release to be executed prior to the last day of active service which includes a release of any and all claims, existing or in future, relating to insurance payments or benefits or damages/payments in lieu of such payments or benefits, and specifically in respect of disability insurance benefits; and

(v) ultimately consider providing actual working notice to the employee.

If advising an employee on a termination offer, it would be prudent to:

(i) always ask the employee if he or she has **any** health issues and investigate whether such health issues may be of a nature to transcend into total disability during any reasonable common law notice period such that the employee would be entitled to disability coverage;

(ii) advise the employee of the legal implications of executing a full and final release and subsequently becoming disabled during the common law notice period (while at the same time advising the employee of his or her entitlement to coverage under a disability insurance policy if he or she becomes totally disabled during the statutory notice period); and

(iii) if the employee is prepared to run the risk of total disability during a common law notice period and is still insistent upon signing a release, attempt to negotiate an increased offer which takes into account the contingencies of a disability occurring during the notice period (although that would likely be extremely difficult unless there is at least some cogent evidence of the real potential of a disability arising).