



Dismissed employee is entitled to damages for lost disability benefits

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In its January 10, 2006 decision in *Egan v. Alcatel*¹, the Ontario Court of Appeal awarded damages for both lost salary and lost disability benefits to an employee who became disabled three months after she was dismissed. In doing so, Ontario's top court made it clear that an employer is obliged, not only to continue the salary paid to a dismissed employee during an appropriate notice period, but also to continue all employee benefits, including short and long-term disability benefits.

For Ms. Egan, the court upheld the trial decision that she was entitled to nine months' notice of dismissal, given that she had been induced by Alcatel to leave secure employment with Bell Canada only 21 months before being terminated. It is a longstanding principle that a dismissed employee's notice period is increased in situations where an employer induces an employee to leave long-term employment and then dismisses her.

The novel issue that the court decided in this case related to how to account for the fact that, only three months after her dismissal, Ms. Egan became disabled and remained disabled for a year thereafter. The Court of Appeal found that Ms. Egan could look to her employer for the loss of long-term disability benefits for the 12 months she was disabled, although she could not recover both salary and disability benefits for the period of disability that fell during her notice period.

In so finding, the Court of Appeal diverged from the 2000 decision of Ontario's Superior Court in *Pioro v. Calian Technology Services*² where an employee who became disabled during her notice period was denied damages for lost disability benefits. In that case, Justice Panet found that,

because the long term disability insurance policy purchased by the employer required the employee to be actively working to claim benefits, the employee would not have been entitled to such benefits even if the employer had paid her appropriate salary in lieu of notice.

The Court of Appeal differed in its approach - focussing on the fact that it is *notice of termination*, not salary in lieu of notice, that is the employer's primary legal obligation to a dismissed employee. Put another way, the primary obligation of the employer is to provide adequate notice of dismissal and to allow the employee to continue working at their normal salary and benefits until the notice period has come to an end. This is commonly called working notice. Because Ms. Egan's disability arose during her nine month notice period, Alcatel had to compensate her for the disability payments she would have received from the insurer, had she been working when she became disabled.

Fortunately for the employer, Ms. Egan's disability only lasted for 12 months. As such, its liability for lost disability benefits was capped at 12 months - or only three months beyond the applicable notice period. However, the reasoning in this case could potentially result in much greater liability for employers who follow the normal practice of trying to negotiate the payment of either lump sum or periodic payments to dismissed employees without requiring them to continue working during the notice period.

Most long-term disability benefits are insured externally under policies that require the employee to be actively working at the time of their disability in order to be covered. As such, even after paying

an employee legally acceptable severance, the employer could be liable for huge damages should the employee become disabled during the applicable notice period and be denied coverage. Those damages could total in the millions of dollars for a younger employee who becomes permanently disabled during his or her notice period. Further, the risk of disability arising during an employee's notice period is not necessarily a remote one – given that long-term disability due to such things as depression or substance abuse could conceivably be related to the loss of a person's job.

The solution? It would appear that an employer has two (possibly three) options to avoid liability for the loss of disability benefits to a dismissed employee. The obvious first option is to obtain a release from the dismissed employee in exchange for the severance payment that covers all claims that might possibly arise from the employee's employment and dismissal, *including* any claims for loss of disability benefits. However, a problem arises where the dismissed employee refuses to settle his or her

claims or execute such a release. This leads to the second option - to provide the employee with adequate working notice. This ensures that the employee will be actively working and able to claim benefits should he or she become disabled. While it is not necessarily pleasant for either party to have an employee remain at the office for several months after being fired, the decision of the Court of Appeal in *Egan* may leave employers with little option but to provide working notice or take the risk of huge future liabilities.

The third possible option may be for the employer to purchase long-term disability coverage that allows dismissed employees to claim benefits for a disabilities arising during the applicable notice period following their dismissal or to try to negotiate such coverage for dismissed employees on a case by case basis. Whether such insurance coverage is even an option available to employers is outside the scope of this article.



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¹ A copy of the full decision may be obtained on the Court of Appeal's website at: <http://www.ontariocourts.on.ca/decisions/2006/january/C42268.htm>

² (2000), 48 O.R. (2d) 275 (SCJ).