RETURN TO WORK ISSUES IN ONTARIO

Termination: Recent Issues And Strategies

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TERMINATION: RECENT ISSUES AND STRATEGIES

A. Dishonesty: Just Cause For Dismissal

Most Human Resource managers have at one time or another asked themselves whether an employee is honest in their explanation for absences from work and, if not, what right do they have to terminate employment. In the recent decision of **McKinley v. BC Tel**[1] the Supreme Court of Canada was called upon to elaborate, for the first time, the circumstances in which an employer would be justified in terminating employment as a result of an employee's dishonest conduct.

McKinley was a 48 year old accountant who had been employed by BC Tel for 17 years. In 1993 McKinley began to experience high blood pressure as a result of hypertension and took some time away from work. In May 1994, McKinley's blood pressure began to rise again and he took a leave of absence on the advice of his doctor. In July 1994, McKinley's superior raised the issue of the termination of his employment. During the discussions McKinley indicated that he wished to return to work, but in a position that carried less responsibility. McKinley's doctor had told him that he could return to work as comptroller and if his hypertension became more acute at that point, it could be controlled with the use of beta blockers. Rather than mention the

[1] [2000] 2 S.C.R. 161 (S.C.C.)

possibility of returning to his former position if beta blockers were administered, McKinley told his employer that his physicians were of the view that a change in jobs would be the most beneficial form of treatment. This statement was not true. McKinley was told that BC Tel would attempt to find another suitable position for him. Although two positions for which McKinley was qualified opened during this period, they were filled by other employees and no alternative employment was offered to McKinley. On August 31, 1994, BC Tel terminated McKinley's employment, even though he was on short term disability. McKinley then commenced an action against BC Tel for damages for wrongful dismissal.

BC Tel initially defended the action on the basis that it had offered McKinley a compensation package of salary and benefits in lieu of reasonable notice. However, in the middle of the trial BC Tel amended its Statement of Defence and pleaded just cause. BC Tel had discovered a letter dated December 12, 1994, in which McKinley had written to his doctor acknowledging that his doctor had recommended a beta blocker as the next method of treatment for McKinley's hypertension, with such treatment beginning upon McKinley's return to work, if his blood pressure continued to remain high. BC Tel alleged that McKinley had deliberately withheld the truth as to his doctor's recommendations regarding the use of beta blockers and their ability to enable him to return to employment without incurring any health risks.

At trial McKinley admitted on cross-examination that his doctor had not advised him that he was of the view that a change in jobs would be the most beneficial form of treatment for McKinley. The trial judge instructed the jury that in order for just cause to exist, the jury was required to find:

1. that McKinley's conduct was dishonest; and

2. that the dishonesty was of a degree that was incompatible with the employment relationship.

The jury found in favour of McKinley.

The British Columbia Court of Appeal set aside the jury award and ordered a new trial on the basis that dishonesty was always cause for dismissal and that the trial judge had erred in instructing the jury that dishonesty would merit termination only if it was of a degree that was "incompatible with the employment relationship".

The Supreme Court of Canada disagreed. It specifically rejected the line of case authority that once dishonesty exists, an employer has the right, as a matter of law, to dismiss its employee. Mr. Justice Iacobucci, writing for the Supreme Court, expressed the appropriate test as follows:

> "…I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
>
> In accordance with this test, a trial judge must instruct the jury to determine:
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> (a) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and
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> (b) if so, whether the nature and degree of the dishonesty warranted dismissal…"[2]

Mr. Justice Iacobucci pointed out that in certain circumstances, such as theft, misappropriation or serious fraud, applying the contextual approach might lead to the strict outcome of termination of employment. However, he suggested that lesser sanctions might be imposed when this was not the case. He stated:

> "This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee's pay for any loss incurred by a minor misuse of company property. This is one of

[2] Id. at p. 187

> several disciplinary measures an employer may take in these circumstances.
>
> Underlining the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and spirit of self-worth individuals frequently derive from their employment,…"[3]

The Supreme Court of Canada made it clear that it favoured an analytical framework that examined each case on its own facts and considered the nature and seriousness of the dishonesty to assess whether it was reconcilable with sustaining the employment relationship.

On reviewing the evidence, the Supreme Court agreed there was a degree of inconsistency between what McKinley was told by his doctor and the information he conveyed to his employer. The court noted, however that there was evidence before the jury to suggest that McKinley believed that beta blockers were only to be considered as a last resort treatment and were not required at that point in time and, further, that they would be administered only if he returned to work in his original job. The court pointed out that while there may not have been full disclosure of all material facts by McKinley, the record led the court to conclude that the jury, acting judicially, could reasonably have

[3] Id. at p. 188

found that McKinley had not engaged in dishonesty in a manner that undermined or was incompatible with his employment relationship.

The McKinley decision is significant. Employee dishonesty will no longer provide the employer with an automatic right to terminate the employment relationship. What is now required is an inquiry into the nature of the dishonest conduct, the context in which the conduct occurred and the effect that the conduct has had on the employment relationship.

The enunciation of the principle of proportionality is also significant. The Supreme Court of Canada has approved the concept of progressive discipline. This concept is widely recognized in the field of labour arbitration. It has not, however, been part of the jurisprudence in non-unionized employment relationships. In the past, courts have taken an all or nothing approach to employment contract repudiation. Dishonesty was considered to be repudiation of the employment contract by the employee and the suspension of an employee without pay was considered to be repudiation of the employment contract by the employer. The McKinley decision therefore marks an important change in approach. Suspension or the docking of pay may no longer be considered repudiation of the contract. In fact, the Supreme Court of Canada suggests that such discipline should be used where the employee’s conduct is not sufficient to justify the termination of employment.

Cases following McKinley have stressed the need for employers to conduct thorough and proper investigations into employee dishonesty. In **Porta v. Weyerhaeuser Canada Ltd.**[4] Porta was a 17 year employee who was one of two supervisors at the defendant's sawmill. On two successive nights Porta loaded lumber into his pick-up truck and took it home. At a meeting with his superiors the next day, Porta did not deny that he took the lumber, but indicated that it was waste wood and he thought he had the authority to take it. The next day Porta's employment was terminated on the basis of cause. Weyerhaeuser asserted at trial that Porta took lumber, some of which was merchantable, for his own use contrary to company policy and in violation of trust and asserted that Porta was dishonest in his responses to company officials during the investigation into his conduct. Weyerhaeuser argued that Porta had ruptured the trust that was essential between the employee and the employer and thereby fundamentally breached the contract of employment, which justified termination without notice.

The trial judge interpreted McKinley as not only requiring a contextual approach and an analysis of the circumstances of the misconduct, but also requiring the employer to properly investigate such misconduct. He stated:

> "In my view, the requirement of a contextual approach and an analysis of the nature and circumstances of the misconduct established by McKinley places an onus on a defendant asserting

[4] [2001] B.C.J. No. 2180 (B.C.S.C.)

> just cause to take a similar contextual approach in its investigation of misconduct and in its determination of the appropriate sanction. Where the investigation conducted in the first instance by a defendant asserting just cause is insufficiently broad to establish the full nature and circumstances of the misconduct and thereby the ability of the court to conduct the sort of analysis envisaged in McKinley is impaired, it follows that the defendant will similarly be impeded in discharging its onus of proof in connection with its claim of just cause".[5]

The trial judge pointed out that the contest between the parties was not over the physical act which was said to constitute the just cause for dismissal but over the nature and context of those acts and the extent to which they could be construed as a fundamental breach of the employment contract. There was therefore an issue as to the nature of the lumber taken (whether it was waste lumber or not), as to the governing policy at the time Porta took the lumber, as to Porta's knowledge of that policy, as to whether Porta was acting under an honest belief in his right to take the lumber and as to the general practice of employees' acquisition of lumber from Weyerhaeuser. The trial judge held that there were significant deficiencies in Weyerhaeuser's investigation of Porta. The trial judge found that the evidence fell short of establishing that Weyerhaeuser's policy on the sale of wood to employees had been distributed and implemented and found that the practice on the acquisition of free lumber differed from the rules asserted by Weyerhaeuser. Further, the trial judge found significant shortcomings into

[5] Id. at para. 14

Weyerhaeuser's investigation into Porta's misconduct, including the following:

(a) the meeting held with Porta one day before the termination of his employment was too cursory. Porta was not provided with all of the information that Weyerhaeuser had in its possession and was not given an adequate chance to respond to it;

(b) Porta may have been mislead about what he was being asked to account for, preventing him from giving a comprehensive answer;

(c) when Porta tried to advance an explanation at the meeting in which his employment was terminated, his superiors cut off his explanation and told him that they were not going to rehash the matter;

(d) Weyerhaeuser declined to inspect the wood that Porta took, which was the only unequivocal and fair way to have determined Porta's truthfulness as to what he had taken;

(e) Porta had indicated that he had received oral approval for what he had done. However, Weyerhaeuser failed to follow up on that issue by obtaining further information from Porta about

the circumstances in which he claimed to have authorization from another employee and then failed to obtain an account from that other employee of the circumstances relating to the taking of the wood; and

(f) management had been aware that there were occasions where employees had treated lumber in excess of six feet as non-merchantable and they could have inspected copies of contemporary material release forms to determine the prevailing practice in connection with the acquisition of no cost lumber.[6]

The court stated that any inconsistencies and apparently misleading statements made by Porta during the course of the investigation had to be considered against the procedural shortcomings of the investigation. The trial judge found that the evidence produced by the investigation was insufficient to permit proof of the sort required on a balance of probabilities that Porta either committed theft, breached company policy, or was dishonest to the required degree and in the appropriate circumstances to permit a conclusion that his termination was justified.[7]

The Porta decision would appear to impose a duty upon an employer to conduct a thorough investigation into employee misconduct,

[6] Id. at para. 133
[7] Id. at para. 115

including a duty to provide the employee with the information which the employer has in its possession and to give the employee an adequate opportunity to respond. If this does not occur, an employer may face the argument at trial that a punishment less harsh than that of termination of employment should have been imposed.

The McKinley approach was applied, with favourable consequences to the employer, in **Blair v. Matrix Logistics**[8]. This case concerned a "problem employee". Matrix carried on business as a warehouse distributor and Blair was employed as a stocker on the plant floor. The Employee Handbook contained policies and procedures, including a complaint process. According to Blair, her team leader, Errol George, began making sexually suggestive comments to her in the fall of 1999. However she did not report these comments to management. At the same time Blair apparently discovered that George was making disparaging comments about her to other team members, including comments that she was a trouble-maker and a loud mouth. She reported George's comments to the director of human resources. When he asked her to supply the names of team members to whom George had allegedly made the remarks, she was unable to comply with this request. The director of human resources spoke to George who denied that he had made any such comments and the director then reported to Blair that in

[8] [2001] O.J. No. 3040 (S.C.J.)

view of the lack of witnesses he was unable to confirm her allegations. The matter did not proceed further at that time.[9]

In November, 1999, Blair again reported that George had made negative comments about her to other team members. Blair again indicated she could not identify the persons to whom George had made the comments and George again denied making any negative comments. In January, 2000, Blair was warned, by memorandum, that ongoing negative comments about fellow team members, team management and Matrix would not be tolerated.

In March, 2000, Blair told her new team leader that “it’s hard to work here when people are talking about you”[10] and indicated that this person was George. A meeting was convened with human resources, Blair, her team leader and George. George denied making comments about her to other team members and Blair was told that she must provide the names of the team members who had reported these comments to her. Blair provided one name. That person was interviewed and denied that George had made any such comments. Matrix then terminated Blair’s employment. Blair commenced an action on the basis that her employment had been terminated without just cause.

The trial judge found that:

[9] Id. at para. 9
[10] Id. at para. 16

> "It is clear that Blair was a difficult employee. Some of the incidents were relatively minor such as her socializing during work hours with other team members; this type of behavior was subject to a verbal reprimand only and properly so. There were other complaints too about her conduct in leaving her trolley blocking the aisle, again relatively minor in the scheme of employer/employee relationships. Ravi Inderjit reported that when he became a team leader he heard complaints from team members every day about her rude and obnoxious behavior…"[11]

The trial judge stated:

> "Mr. George was Ms. Blair's team leader. As such, her dishonest allegations were not reconcilable with their continuing relationship as employees of Matrix. Mr. George's authority as team leader was undermined by the repeated untrue allegations not only with Ms. Blair but with respect to his relations with other team members and his superiors."[12]

The trial judge further stated:

> "In the end, Ms. Blair's continued dishonest allegations severed the bond of trust that hold together any employer/employee relationship. No other response than immediate termination could be expected from the employer."[13]

As a result of McKinley and cases that have applied the McKinley principles, it will now be more difficult to terminate the employment of an employee who acts dishonestly (for example obtaining a sick leave although not truly sick or using leave for

[11] Id. at para. 20
[12] Id. at para. 30

a different unauthorized purpose, such has earning money or attending an out of town wedding). Employers, however, can help themselves meet the new tests in the following ways:

(a) the employer should maintain clear and reasonable rules and policies for notification of absences and illnesses;

(b) employees should be made aware of the policies and the policies should be followed;

(c) in the event of absences without leave, the employee should be contacted and records should be kept of the contact attempts, conversations and their outcome;

(d) where there are reasonable grounds to believe that an employee has abused a leave or absence from work, any investigation should include an interview with the employee in which the employee is provided with the facts known by the employer and given an appropriate opportunity to provide their side of the story and respond to the employer's concern;

(e) in conducting an interview with the employee, ask questions which could be verified through other parties. For example,

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[13] Id. at para. 34

did the employee seek medical attention and, if so, the name of the doctor and the dates of attendance. Notes should be kept of the interview and the employee should be offered the opportunity to review the notes for accuracy. If discrepancies are revealed in the subsequent investigation, those discrepancies should be brought to the employee's attention for the purpose of obtaining an explanation;

(f) the employer should consider any past misconduct on the part of the employee and any prior discipline to which the employee has been subjected, including prior warnings to the employee with respect to similar type conduct;

(g) the employer should consider whether it has condoned similar conduct on the part of its employees;

(h) the employer should consider the work record and length of service of the employee; and

(i) the employer should consider whether a proportionate response rather than termination of employment is appropriate.

B. Effect of Failing To Terminate "Honestly and in Good Faith"

The seminal case in the area of "bad faith" conduct is the Supreme Court of Canada decision in **Wallace v. United Grain Growers Ltd.**[14] In 1972 United Grain Growers decided to upgrade its commercial printing operation. It interviewed Wallace, who had been working for approximately 25 years for a competitor. Wallace explained that he was 45 years of age and if he were to leave his current employer he required a guarantee of job security. He also sought assurances regarding fair treatment and remuneration. Wallace was told that if he performed as expected he could continue to work for the company until retirement.[15]

Wallace commenced employment in 1972 and was the top sales person for each of his fourteen years of employment. In 1986, at the age of 59, his employment was terminated without explanation. Seven days later, Wallace was advised that the main reason for the termination was his inability to perform his duties satisfactorily. He commenced an action for wrongful dismissal and the company defended on the basis of cause and maintained that allegation until the day before trial. The termination of Wallace's employment and the allegations of cause created emotional difficulties for Wallace and he was forced to seek psychiatric help. His attempts to find similar employment were largely unsuccessful. At trial, Wallace received an award of

[14] [1997] 3 S.C.R. 701
[15] Id. at p. 710

damages for wrongful dismissal based upon a 24 month period of notice and aggravated damages for mental distress of $15,000. The Manitoba Court of Appeal reduced the notice period to 15 months and disallowed the award for aggravated damages. The Supreme Court agreed with the setting aside of the award of aggravated damages, as such damages required an actionable wrong independent from the termination of employment without reasonable notice.

However, the court found that Wallace could be compensated for his employer's breach of its "good faith" obligations and its failure to "deal fairly" with him on the termination of employment. The decision contains the following significant statements:

> "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional wellbeing."[16]

> "The point at which the employment relationship ruptures is the time when the employee is vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that results from dismissal…I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to

[16] Id. at p. 741-742

> ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period."[17]
>
> "The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of a dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive…."[18]

The court indicated that where bad faith and unfair dealing are found, the appropriate remedy is to extend the reasonable period of notice rather than providing an award under a separate head of damages. The Supreme Court concluded that the factors of Wallace's advanced age, his 14 year tenure, his limited prospects for re-employment, the inducement made to Wallace to leave his prior employer, the guarantee of job security and the bad faith conduct supported the trial judge's decision to award damages at the high end of the scale of 24 months.

This decision is of significant benefit to employees. Most employees would not be able to establish a claim for aggravated damages since that requires an actionable wrong independent of the failure to give reasonable notice of termination of employment. Punitive damages are only awarded in the most outrageous and high-handed circumstances and would therefore

[17] Id. at p. 742
[18] Id. at p. 743

exempt most employers. The concept of “bad faith” conduct will therefore assist employees in obtaining additional damages that otherwise would be unavailable to them.

Cases that have applied the Wallace decision have generally fixed the period of reasonable notice for the termination of employment and then added a “bump up” for Wallace damages of between 2 and 6 months, although some courts have simply used a lump sum approach that included a consideration of bad faith conduct.

In **McNamara v. Alexander Centre Industries Ltd.**[19] McNamara had been hired in 1971. He rose from comptroller to eventually become president of the company. In the summer of 1995 he advised his employer that, for medical reasons, he would be off the job indefinitely. One week later his employment was terminated. He commenced an action for wrongful dismissal and the trial judge awarded him damages based upon 24 months’ notice and an additional 2 months’ compensation for “bad faith” damages.

In the decision of **Pioro v. Calian Technology Services Ltd.**[20] Calian terminated the employment of Pioro on July 29, 1997. Pioro was 45 years old and had been an employee for 19 years. The company made a severance offer which was not accepted by Pioro. Pioro told the company that one of the reasons he did not accept the offer was that the letter of offer did not reflect the fact that he held the position of “Manufacturing Manager”. Calian

[19] (2001), 53 O.R. (3d) 481 (C.A.)
[20] (2000), 48 O.R. (3d) 275 (S.C.J.)

responded by stating that its offer was reasonable and that its payroll records showed his title as “Production Supervisor”. Although the letter of offer stated that Pioro would be provided with a letter of reference confirming his employment and position with the company, no such letter of reference was provided. From July through December, l997, Pioro was unsuccessful in obtaining alternate employment. In December, 1997, he was diagnosed as having heart problems and later became unable to work due to disability.

Pioro argued that his damages for wrongful dismissal should be increased as a result of bad faith conduct on the part of Calian. The court agreed. It found that Pioro held the position of Manufacturing Manager and that Calian had taken the position that Pioro held the lower level position of Production Supervisor in a calculated effort to limit its liability with respect to the determination of reasonable notice. The court accepted the evidence of Pioro that Calian’s position caused him difficulty in applications for future employment, knowing that Calian, on a reference check, would indicate that he was only a production supervisor. The trial judge noted that the promised letter of recommendation was never sent to Pioro and he found that Calian had not met its obligation of good faith and fair dealing.[21]

[21] Id. at p. 283

The court awarded Pioro damages based upon a notice period of 22 months, although it did not break down the portion of the award that was represented by the bad faith conduct of Calian.

One of the most recent cases is **Marshall v. Watson Wyatt & Co**.[22] Marshall had been employed in a senior management position for approximately 1 year. She had been hired in the face of a competing offer for her services. She had 17 professional staff reporting to her and generated substantial revenue for the company during her employment. Her employment was terminated and she commenced an action for wrongful dismissal. The jury awarded Marshall damages based upon 9 months' notice and an additional 3 months' notice for bad faith conduct. The Court of Appeal upheld the 12 month award. It found the bad faith conduct included the following:

(a) the defendant's management had advised its human resource department that Marshall's dismissal was a result of restructuring and then it pleaded that it had just cause to terminate employment based upon poor work performance;

(b) the defendant refused to pay $80,000 in commission revenue which it had acknowledged owing to her; and

[22] (2001) 57 O.R. (3d) 813 (C.A.)

(c) the defendant delayed several months in sending the record of employment.

It is clear that as a result of Wallace and subsequent cases, courts will increase the notice period and therefore damages to employees for a breach of the employer's obligation of good faith and fair dealing at the time of termination of employment. In my view, the termination of employment of an employee who advises that they must be absent from work for medical reasons or who is absent due to illness from a disability or due to parental leave, could well attract the imposition of additional damages for bad faith conduct.

C. Disability Insurance Benefits: Can they be deducted from damages?

Prior to 1997, the law in Ontario was clear. An employer who terminated the employment of an employee while absent due to sickness or disability, could not set off any disability payments that the employee received from damages for wrongful dismissal.

The leading case was the 1986 Ontario Court of Appeal decision in **McKay v. Camco.**[23] Approximately two weeks after receiving notice of termination of employment, McKay suffered a serious eye injury and thereafter received short term disability benefits. The issue was whether Camco was entitled to deduct those benefits from

[23] (1986), 11 C.C.E.L. 256 (Ont. C.A.)

damages for wrongful dismissal. The court said no. Mr. Justice Blair stated:

> "The appellant's right under the contract of employment to disability payments and to proper notice of dismissal are not only different in kind but also serve different purposes. The right to disability payments is intended to provide income to the appellant when he is unable to work. The purpose of requiring reasonable notice is to give the dismissed employee an opportunity to find other employment…His rights to disability payments and to damages for breach of contract arose at different times, served different purposes and were based on different legal rights. They cannot be set off against each other. If disability payments were deductible from damages for 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."[24]

Then in 1997, McKay v. Camco was overruled by the Supreme Court of Canada in **Sylvester v. British Columbia**[25]. Sylvester was a contract employee. In June, 1992, he became ill and began receiving short-term disability benefits. He received such benefits until December 31, 1992. The disability insurance plan was funded entirely by the employer. Sylvester made no contributions to the plan. In July, 1992, he received notice that his employment was being terminated because of a reorganization. The employer offered Sylvester 12.5 months' salary as severance,

[24] Id. at pp. 268-269
[25] [1997] 2 S.C.R. 315

less any benefits received under the short-term disability plan. Sylvester commenced an action for wrongful dismissal.[26]

The trial judge found that Sylvester was entitled to 15 months' notice, less short-term disability benefits received during the notice period. The British Columbia Court of Appeal increased the notice period to 20 months, without any deduction for short-term disability benefits received.

The Supreme Court of Canada disagreed and found in favour of the employer. Mr. Justice Major stated:

> "In this case, the STIIP and the LTDP should not be considered contracts which are distinct from the employment contract, but rather as integral components of it. This contact did not provide for the respondent to receive both disability benefits and damages for wrongful dismissal, and no such intention can be inferred."[27]

The Supreme Court of Canada reached this conclusion for two reasons. It indicated that the terms of the disability plans demonstrated that disability benefits were intended as a substitute for regular salary and that an employee who receives such benefits would not receive a salary. Secondly, the court stated that a simultaneous payment of disability benefits and damages for wrongful dismissal was not consistent with the terms of the employment contract. The court stated:

[26] Id. p. 318
[27] Id. at p. 321

> "Damages for wrongful dismissal are designed to compensate the employee for the breach by the employer of the implied term in the employment contract to provide reasonable notice of termination. As discussed above, the damages are assessed by calculating the salary the employee would have received had he or she worked during the notice period, notwithstanding that the employee may, in fact, have been prevented from doing so. The damages are based on the premise that the employee would have worked during the notice period…Disability benefits under the STIIP and LTDP, on the other hand, are only payable when the employee is unable to work…The respondent's contractual right to damages for wrongful dismissal and his contractual right to disability benefits are based on opposite assumptions about his ability to work and it is incompatible with the employment contract for the respondent to receive both amounts. The damages are based on the premise that he would have worked during the notice period. The disability benefits are only payable because he could not work. It makes no sense to pay damages based on the assumption that he would have worked in addition to disability benefits which arose solely because he could not work. This suggests that the parties did not intend the respondent to receive both damages and disability benefits."[28]

The Court did, however enunciate exceptions. The court stated that parties to an employment contract could agree, or there may be cases where an intention could be inferred, that the employee is to receive both damages for wrongful dismissal and disability benefits. Further employees could also obtain both where the employee had provided consideration for benefits from a private insurance plan.[29]

[28] Id. at pp. 322-323
[29] Id at. p. 324

For the next four years the law seemed clear. If the employee had not made any financial contributions towards the disability insurance premiums, disability benefits received during the period of reasonable notice were subject to deduction from damages. However, in two recent decisions rendered simultaneously, the Ontario Court of Appeal rejected the employers' arguments that disability benefits should be deducted from damages.

In **Sills v. Children's Aid Society of Belleville**[30], Sills received 14.5 months' written working notice of the termination of her position due to restructuring and was promised an additional 3.4 months' of severance pay. Within 2 months of receiving this notice, she suffered a disabling depression and was unable to work during the balance of the notice period. She received disability payments during this period.

Sills commenced an action for wrongful dismissal. The trial judge held that the proper working notice should have been 16 months and an additional 3.4 months' of severance pay. He held that the disability payments could not be deducted from the damages because Sills had earned her disability benefits as part of her compensation package. The employer appealed.

The employer argued that Sills had made no direct contribution to the insurance benefits and that it had established the plan, ran

[30] (2001), 53 O.R. (3d) 577 (C.A.)

the plan and paid all of the premiums, except for an indirect contribution by way of a nominal employment insurance premium reduction for employees covered under the disability policies. The Court of Appeal agreed with the trial judge that Sills had earned the disability benefits as part of her compensation, based upon the uncontradicted evidence of Sills at trial that she had traded off some salary in return for benefits. Sills had therefore indirectly contributed to the disability benefits. The court stated:

> "I consider it reasonable to assume that an employee would not willingly negotiate and pay for a benefit that would allow her employer to avoid responsibility for a wrongful act. I consider it reasonable to infer that parties would agree that an employee should retain disability benefits in addition to damages for wrongful dismissal where the employee has effectively paid for the benefits in question. The same reasoning applies to the suggestion in Sylvester that a disabled employee receives adequate notice should not be treated differently from a disabled employee who is wrongfully dismissed – an employer should not be relieved of the obligation to pay damages for a wrongful act because of a benefit plan provided by the employee. Moreover, the concern expressed in Sylvester, that disabled employees were wrongfully dismissed be treated the same as working employees who are wrongfully dismissed, simply does not arise where the employee has paid for the plan that provides a disability income."[31]

By focusing on one of the exclusions in Sylvester (that the disability benefits were akin to benefits from a private insurance plan for which the employee has provided consideration)

[31] Id. at p. 591

and finding that Sills had indirectly contributed to the disability benefit plan the court limited the Sylvester decision through the concept of an implied purchase of benefits.

On the same day that the Sills decision was released, the Ontario Court of Appeal also released the decision of **McNamara v. Alexander Centre Industries Ltd.**[32] McNamara was the president of the company. His compensation included disability insurance coverage. In the summer of 1995 McNamara advised his employer that, for medical reasons, he would be off the job indefinitely. One week later his employment was terminated. McNamara applied for and received long-term disability benefits from August, 1995 to January, 1997 in the amount of $163,000. He commenced an action for wrongful dismissal and the trial judge awarded him 26 months' compensation. The trial judge did not deduct the long-term disability benefits from the damage award and the employer appealed.

The Court of Appeal upheld the trial judgement. The court stated that there were two features that distinguished the facts in McNamara from that in Sylvester. Firstly, while neither Sylvester nor McNamara had contributed to the disability insurance premiums, McNamara had testified that at the time of hiring he had notified the prospective employer of the importance of the various insurance plans to him and that if he obtained such coverage, he would be prepared to take the offered salary. The

[32] (2001), 53 O.R. (3d) 481

court accepted McNamara's evidence that he had taken a somewhat lesser salary due to the insurance plans and therefore agreed that he had indirectly contributed to the long-term disability insurance plan.

Secondly the court referred to the statement in Sylvester that there may be cases in which it can be inferred that the parties to an employment contract have agreed that the employee is to receive both disability benefits and damages for wrongful dismissal. The Court of Appeal pointed out that if disability benefits were deducted from damages, McNamara would have forfeited all of the disability payments, whereas the employer would have received a windfall of $163,000. If, however, the disability benefits were not deducted, McNamara would be treated generously but the employer would pay precisely what the law required it to pay, being damages in lieu of reasonable notice for wrongful dismissal. The court concluded that a reasonable employer and a reasonable prospective employee, if they had turned their minds to what would happen if the employer fired McNamara when he became disabled, would have agreed on the second result.[33]

The effect of Sills and McNamara is that there is no longer any significant distinction between cases where an employee directly contributes to a disability insurance plan and cases where it is provided by the employer as part of a compensation package.

[33] Id. p. 488

Sylvester may therefore be limited to those cases where the employer self-insures with respect to disability (in Sylvester the employer, the Government of British Columbia, made both the salary and disability payments, whereas in the Sills and McNamara decisions benefits were paid by an independent insurer).

All however may not be lost. To avoid a conclusion similar to that in Sills, it would be prudent for an employer to adduce evidence at trial (if such evidence could be adduced) that a greater salary would not have been paid to the employee, if benefits had not been offered.

In addition a double recovery by the employee can be defeated where a court can infer that at the time of the commencement of the employment agreement there was no intention for a double recovery. This issue could be addressed by employers at the time of hiring by placing a provision in an employment contract that precludes an employee receiving both disability benefits and damages for termination of employment. Such a provision would minimize termination costs in situations where employees receive disability benefits during the notice period.

D. Continuation of Insurance Benefits

At law, an employee is entitled to the salary and other benefits that form part of the remuneration package during the reasonable

period of notice that follows termination of employment, unless the employer and the employee have agreed otherwise.

One area of difficulty is the extension of short and long term disability benefits subsequent to the termination of employment. Under Ontario's *Employment Standards Act* benefit plans must be maintained during the statutory notice period provided in the *Act*, which varies between 1 and 8 weeks, depending upon the length of employment. This requirement cannot be waived and disability insurers will therefore extend this coverage during the statutory period of notice.

However, disability insurers in the Province of Ontario rarely permit an employer to extend this coverage beyond the statutory period of notice. This can expose the employer to the substantial risk of becoming a self insurer.

This risk was demonstrated in **Prince v. T. Eatons Co.**[34] In January, 1983, after 17 years of employment, the plaintiff was given 8 weeks notice of the termination of his employment and 34 weeks' severance pay. In July, 1983, the plaintiff became totally disabled as a result of a motor vehicle accident. He made a claim for damages for wrongful dismissal and also claimed entitlement to long-term disability benefits under Eatons' long-term disability income plan. The trial judge found that the plaintiff

[34] (1992), 41 C.C.E.L. 72 (B.C.C.A.)

was entitled to 42 weeks' notice and also entitled to receive the benefits provided under the long-term disability plan.

Eatons' long-term disability insurance was one of self-insurance. The 1983 policy manual distributed to employees stated that the long-term disability benefits would cease on the termination of employment.

The British Columbia Court of Appeal stated:

> "It has long been the law in this jurisdiction that a dismissed employee whose employment was terminated wrongfully is entitled to compensation for loss suffered as a result of the deprivation of fringe benefits."[35]

The court interpreted the words "termination of employment" in the policy manual to mean "lawful termination of employment". Since the disability occurred during the period of reasonable notice found by the trial judge, the plaintiff was entitled to the award of long-term disability benefits.

Fortunately for employers, a recent Ontario decision has restricted the application of this principle. In **Pioro v. Calian Technology Services Ltd.**[36] Calian terminated the employment of Pioro on July 29, 1997. Pioro was 45 years old and had been an employee for 19 years. In the letter notifying Pioro of termination he was offered 30 weeks' salary, which included 8

[35] Id. at para. 35
[36] (2000), 48 O.R. (3d) 275 (S.C.J.)

weeks' termination pay and 19 weeks severance pay under Ontario's *Employment Standards Act.* The letter indicated that:

> "Your current employee benefits will continue until the end of your notice period. All benefits cease on September 23, 1997 and as of that date, the onus will be on you to obtain replacement coverage if you so choose."[37]

Pioro did not accept the severance offer. In December, 1997, he was diagnosed as having heart problems underwent surgery. After April 1998, Pioro was totally disabled and unable to continue to work because of illness.

Pioro commenced an action for damages for wrongful dismissal and also for long-term disability benefits on the basis that he became disabled during the notice period to which he was lawfully entitled.

The trial judge awarded Pioro damages based upon 22 months' notice. However, his claim for long-term disability benefits was denied. The trial judge noted that the employee handbook stated that "your insurance will terminate on the date you would cease to be eligible to become insured except as required by law."[38] The judge also noted that at trial the employer adduced expert evidence that the long-term disability insurance policy was an average employer/employee benefits contract, not dissimilar to

[37] Id. p. 280
[38] Id. at p. 285

many seen in the industry and was consistent with industry standards in not allowing for conversion of LTD benefits after termination of employment. The trial judge found that Calion's LTD policy, which did not provide for conversion of benefits, was in accordance with industry standards. The trial judge concluded that if the insurance policy itself did not provide coverage beyond September, 1997, Pioro could have no claim against the employer if he became disabled subsequent to that time, but during the period of reasonable notice.

The judge also rejected the argument that there was an obligation on Calion to provide alternative coverage to Pioro at the date of termination of his employment. In his view, the obligation on the employer, in accordance with the employment contract, was to provide LTD benefits which were within industry standards.

In order to minimize a claim for disability benefits by an employee who becomes disabled during the reasonable notice period, employers should ensure that their employees have been advised of the limitations in the disability insurance coverage, including when disability coverage will cease. In addition, on termination of employment, employees should be advised in writing of the date that the disability insurance coverage ceases. As an extra precaution, releases obtained from employees as part of a severance arrangement should include a release with respect to disability claims.

As human resource managers, you will sometimes be requested to prepare termination papers for employees who are absent due to illness or disability and are receiving long-term disability benefits. The “business manager” has suddenly discovered that he no longer needs the employee or that the employee had not performed adequately. Before contemplating any such termination (and leaving aside the prohibitions contained in the Human Rights Code and other statutes), consider the following:

(a) is the disability a fatal condition? At common law death will terminate an employment contract without requiring the payment of any further amount by the employee (subject to insurance plans providing benefits upon death or a written employment contract that provides for an employer payment upon death). In this scenario, a termination of employment is not advisable. The employee should be left to continue on long-term disability benefits. Economically, this is the most cost efficient resolution for the employer and avoids the prospect of bad faith damages and punitive damages in the event of an action for wrongful dismissal;

(b) if the disability is permanent or there is a reasonable prospect that it will become permanent the better strategy would not be one of termination of employment. Eventually the

doctrine of frustration of contract will apply so that termination of employment can occur without the requirement of notice or pay in lieu of notice;

(c) the employer should not terminate employment if by doing so the employee would no longer be eligible to continue to receive disability insurance benefits. This would expose the employer to damages far greater than damages for failing to provide reasonable notice of termination of employment.

Finally, most medical and dental insurers and some life insurers will allow insurance coverage to be extended during a reasonable period of notice. If possible, such coverage should be offered to employees as the premiums paid by employers will normally be far less than the damages employers may be required to pay in the event an employee purchases replacement insurance coverage during the reasonable period of notice or incurs expenses that otherwise would have been paid by such insurance.

It is important, however, that employers obtain the permission of their insurer before offering to extend insurance coverage to employees beyond the statutory notice period set out in Ontario's *Employment Standards Act.* It is not unknown for an employer to enter into a severance agreement with an employee which includes

extended insurance coverage, and then find that its insurer later declines to make the payments set out in the insurance policy, on the basis that its permission to extend such coverage beyond the statutory notice period was not obtained. The employer will then become the insurer.

E. Mandatory Mediation and Settlement Conferences: Reducing Your Losses

Despite your advice to the business managers about bad faith damages, aggravated damages, punitive damages, damages for wrongful dismissal and legal costs, you have been instructed to prepare the termination of employment documents for John (who is absent due to disability) or Samantha (who is on parental leave). You are assured that this is necessary because the manager has now decided that their work performance had been poor (although written performance reviews do not indicate this) or that the position has suddenly become redundant. Your instincts tell you that their absence may have played a role in the decision. Your experience tells you that the employee’s lawyer will seize upon the timing of the termination and that a claim may be made under various statutes or an action may be commenced for wrongful dismissal, with various forms of damages claimed.

John or Samantha chooses the remedy of an action and a statement of claim is issued and served. The company’s lawyer must prepare the statement of defence. Various files are requested, some

interviews conducted and, from a legal standpoint, the situation may be revealed as worse than you had originally thought. The statement of defence is filed and you begin to calculate the damages to which the company is exposed, the legal costs of defending the action through discoveries and trial, the possibility of being required to pay a portion of the plaintiff's legal costs and the lost management time that will inevitably occur in the defence of the action.

Recent changes to Ontario's *Rules of Civil Procedure* now provide employers with a new opportunity to effect a settlement at an early stage in the action.

Rule 24 imposes mandatory mediation on actions that have been commenced in Toronto and Ottawa. It is expected that this rule will be expanded to apply to other cities and judicial districts in the province. The rule requires that within 30 days after the filing of the statement of defence, the plaintiff's lawyer shall file with the mediation co-ordinator a notice stating the mediator's name and the date for the mediation session. This requires the lawyers for both sides to agree upon a mediator and a date for the mediation session. If the notice is not received within 30 days, the mediation co-ordinator assigns a mediator from a list of the mediators and the assigned mediator serves a notice on the lawyers stating the place, date and time of the mediation session. The rule requires that the mediation take place within 90 days after the statement of defence has been

filed, unless the court orders otherwise. The mediation session may be postponed for up to 60 days if the consent of both parties is filed with the mediation co-ordinator.

The rule requires that at least 7 days before the mediation, each lawyer shall serve a statement setting out the factual and legal issues in dispute and the position and interests of the party making the statement. The lawyer is also required to attach to the statement any documents that is considered of central importance in the action. The mediator is also provided with a copy of the statement of claim, statement of defence and reply. Attendance by the parties is mandatory. Therefore, at the mediation the lawyers, the employee and an employer representative will be present. Sometimes a company's representative will consist of both a human resource person or in house counsel and the business manager who was directly involved with the employee.

If the company representative does not have authority to enter into a settlement and require another person's approval, arrangements must be made to have ready telephone access to that other person throughout the session so that the necessary approval can be obtained.

The mediation session normally lasts approximately 3 hours and is paid for equally by the parties, with present costs approximating $321 each.

In order to promote settlement, the discussions during the mediation are to be treated as confidential and cannot be used in the action, should a settlement not be effected. To reinforce this requirement the parties will sign a mediation agreement prior to or at the commencement of the mediation.

During the mediation, the mediator will normally request each party or their lawyer to present their view of the issues and facts surrounding the claim and the defence. At some point during the mediation the mediator usually suggests that the parties separate and negotiations are then conducted by the mediator moving from room to room.

A properly conducted mediation using skillful negotiating techniques can often result in a settlement in which the employer will pay less money to the employee than might otherwise be the case if the action proceeded to trial. In these negotiations the plaintiff may abandon a reasonable claim for bad faith or a claim for punitive or aggravated damages in return for concessions on the length of reasonable notice or other issues. Remember, if the mediation occurs prior to examinations for discovery, the employee’s lawyer may not yet have the documentary or discovery evidence to bolster an alleged case of bad faith conduct, punitive damages or underpaid commissions or bonuses. Depending on the nature of the action and the facts, your bargaining position may worsen if the action proceeds further.

A settlement reached at mediation avoids the costs of proceeding further in the action and the risk that the employer may be required to pay a significant portion of the plaintiff's legal costs after trial. Used effectively, mandatory mediation can achieve significant cost savings for employers.

If the action does proceed through examinations for discovery and is placed on the trial list, the *Rules of Civil Procedure* require that a pre-trial conference be held for the purpose of attempting to settle the action. The plaintiff and the defendant's lawyer are required to file a Pre-trial Conference Memorandum setting out the theory of their position and the lawyers then attend before the assigned pre-trial conference judge (who is not the judge who will preside at trial) in an attempt to settle the action. There are some judges who will insist that each of the parties be present at the pre-trial conference. However, this is the exception rather than the rule.

The pre-trial conference judge will often provide their view as to liability and damages and will normally engage counsel in discussion in an attempt to resolve the action. At this point in time, the employer will likely have received the opinion of their lawyer as to the probability of success, the range of damages that might be awarded and the legal costs that might be incurred in proceeding with the trial of the action and should therefore be prepared to provide their lawyer with settlement instructions.

From my perspective, this point is normally the last cost effective time in the action to effect a settlement. After this date, both parties will be involved in trial preparation. Waiting until the day before trial to settle an action or to see “who will blink first” is unlikely to be cost effective, unless the amounts in dispute are such that legal costs are not a significant factor or the dispute is a matter of principle and “money” is not the prime consideration.

F. The Settlement Gone Astray: Effective Releases

Employers normally request a release from an employee in return for providing a severance package in a termination of employment situation. The purpose of the release is to prevent the employee from commencing an action against the employer arising from the termination of employment.

There have been a number of cases where employees have succeeded in an action against their employer for damages arising out of the termination of their employment despite the fact that a release was signed. Releases and settlements are subject to being overturned by a court on the same basis that any contract can be overturned. The most common grounds of attack are lack of consideration and unconscionability.

The requirement of consideration arises from the legal concept of "accord and satisfaction". Accord and satisfaction is the purchase of a release from an obligation by means of any valuable consideration not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.[39] Therefore the release should clearly state the consideration which is being provided to the employee.

A settlement which does not provide consideration to the employee fails to fulfil the concept of accord and satisfaction and will be found invalid. For example, if the only payments being made are those required by the termination and severance pay provisions of the *Employment Standards Act* or the specific terms of a written contract of employment, there would be no "consideration" for the granting of the release.

To prove unconscionability the employee must establish that there was an inequality in the position of the parties arising out of the ignorance, need or distress of the employee, which left the

[39] *British Russian Gazette & Trade Outlook Ltd. v. Associated Newspapers Ltd.,* [1933] 2 K.B. 616 (C.A.)

employee in the power of the employer and proof of substantial unfairness of bargain obtained by the employer.[40]

The following guidelines will be of assistance in reducing the possibility that the release and the settlement will be set aside for unconscionability:

(a) during the interview in which employment is terminated, notes should be taken as to what was said to the employee, to avoid a future claim that there was undue pressure on the employee to enter into the settlement. Preferably an additional person will be present to act as a witness. In almost every case where unconscionablity has been found there has been some form of undue influence to sign the release;

(b) the employer's letter of offer should provide a sufficient period of time to the employee to consider the offer and the release should provide that the employee has been given an opportunity to obtain independent legal advice. Although independent legal advice is not required for a release to be valid, at least one case (**Blackmore v. Cablenet Ltd.**[41]) has

[40] *Blackmore v. Cablenet Ltd.*(1994), 8 C.C.E.L. (2d) 174 (Alta. Q.B.); *Harry* v. *Kreutzige* (1978), 9 B.C.L.R. 166 (B.C.C.A.)
[41] Id. p. 185

noted that the presence of legal advice can effectively negate a claim of unconscionability;

(c) under no circumstances should acceptance of the offer be required before the employee can receive what he or she is already owed by the company (i.e. pay already accrued, bonus, vacation pay etc.). In **Augustine v. Nadrofsky Corporation**,[42] the employee was told that he must sign the release in order to receive his pay cheque (to which he was already entitled and for which he had a real need). The employee signed the release and received his pay cheque and a second cheque for two weeks' severance pay. The Ontario Divisional Court found that this unreasonable demand by the employer, having regard to the inequality of bargaining power between the parties, constituted sufficient coercion to vitiate the legal effect of the release;

(d) the employee should not be asked to sign the release in the office, but should be advised as to the date of expiry of the offer. The time period chosen should be sufficient to provide the employee with a reasonable opportunity to consider the offer and obtain independent legal advice. In addition the employee should not be mislead. The risks are exemplified by

[42] (1986), 17 O.A.C. 297 (Ont. Div. Ct.)

the decision of **Waterman v. Frisby Tire Co.**[43] Waterman, an employee with 21 years of service, was told that he was being terminated due to the economic climate. In fact, he was being terminated for performance deficiencies. He was given 1 day to decide whether to accept the offer of 9 months' severance pay. The employer was aware of financial pressures that the employee was under. Waterman was not told to and did not seek independent legal advice. The employee signed the release and at the time did not realize that he would have been entitled to 18 months' notice at common law. The Court found that there was an inequality of bargaining power by reason of the employee's ignorance of his rights, his family needs and his trust of the employer and that the deception of the employee lead him to take a more trusting and accepting approach to the agreement presented to him. This, together with the pressure to sign the release the next day, allowed the employer to use its position of power to achieve a substantial advantage. The release and settlement were therefore set aside; and

(e) listen to suggestions the employee may have regarding the terms of settlement and, if you consider it reasonable and appropriate to do so, make changes to the terms of the settlement proposal. In **Sapieha v. Intercontinental Packers**

[43] (1974) Ltd. (1995) 13 C.C.E.L. (2d) 184 (Ont. Gen. Div.)

Ltd.[44] the court found that an employee's active negotiation and an employer's receptiveness to the employee's ideas negated the employee's later claim of unconscionability.

[44] (1985), 10 C.C.E.L. 87 (Sask. Q.B.)