While most employers are familiar with the concept of reasonable notice of termination, or payment in lieu thereof, few employers truly understand the potential liability they are exposed to if an employee is terminated without cause and subsequently becomes disabled during the reasonable notice period. This issue was recently highlighted by the Ontario Court of Appeal in *Brito v. Canac Kitchens*, 2012 ONCA 61.

**THE FACTS**

In that case, the employer terminated a 55 year old employee with twenty-four years of service without just cause as a result of organizational restructuring. Upon termination, the employer provided the employee with the minimum statutory payment for pay in lieu of notice of thirty-two weeks and continued his employment benefits for eight weeks, which included short-term and long-term disability coverage. Two weeks after his termination, the employee obtained new employment. The salary was lower than his previous employment and his new employer did not offer disability coverage. Sixteen months after he commenced his new employment, the employee was diagnosed with cancer and became permanently disabled.

The employee successfully sued his former employer for wrongful dismissal. The trial judge held that the employee had been entitled to 22 months of notice of termination. If the employee had been provided with reasonable notice of termination, he would have continued to have disability insurance coverage by his former employer, and thus he would have been eligible to apply for disability benefits after he became disabled.

**THE DECISION**

The trial judge found that the employer had consciously chosen not to make alternative arrangements to provide disability coverage upon terminating his employment. Furthermore, the trial judge rejected the argument that the employee failed to mitigate his damages by not seeking alternate employment after being diagnosed with cancer. In the end, the employer was found liable for not only the cost of the disability benefits the employee would have received during the 22 month reasonable notice period, but the entire amount of long-term disability benefits the employee would have received until he turned 65, totalling almost $200,000!

The Court of Appeal upheld the decision of the trial judge on all matters except the award of $15,000 for punitive damages.

**LESSONS FOR EMPLOYERS**

An employer who fails to maintain disability coverage for an employee during the reasonable notice period will be deemed to have stepped into the shoes of the insurer. In the most extreme example, an employer could be liable for paying disability benefits for a terminated employee until the employee reaches the age of 65. This can come with a very large price tag.
**RECOMMENDED STEPS**

Employers cannot foresee whether an employee may become disabled during the reasonable notice period. The risk of an employee becoming disabled during the reasonable notice period is particularly significant for employees who attract a longer notice period, such as:

- Long service employees;
- Older employees; and
- Employees who were induced to leave other employment.

Employers can take steps to reduce the risk of an award for damages arising from a loss of disability benefits for a terminated employee by:

- Reviewing their existing disability contracts to determine the extent of disability coverage and what condition(s) will trigger cessation of coverage (i.e., whether an employee must be actually at work at the time of application);

- Including a clause in the employment contract which limits the amount of wages and benefits, including short-term and long-term disability benefits, payable upon termination without cause. A properly drafted employment contract that is entered into by the parties is a well-recognized way in which employers can reduce the risk of exposure to liability;

- Negotiating a mutually agreed to severance package with an employee which is contingent upon the employee signing a release. A properly drafted release can be raised in the event of a later claim for loss of disability benefits and can also protect against other employment related claims;

- Arranging for continued disability coverage for the period of time equivalent to the reasonable notice period the employee is entitled to. If this is not included in your group benefits package, consider purchasing “bridge coverage” in order to provide disability benefits for the period equivalent to the reasonable notice period. “Bridge coverage” can be purchased for individual employees upon termination and has the effect of extending benefits outside of the group plan for a period of time; and

- Providing employees with working notice of termination equivalent to the reasonable notice period they are entitled to under the common law. If the employer no longer wishes for the employee to be in the workplace, the employee could be placed on a leave of absence for the duration of the notice period, during which time all benefits should continue (although it is important to read the specific wording in the applicable benefits plan).

Each employer should consider what approach would work best for its organization, depending upon its resources, tolerance for risk and employee relations.

---

**Contact**

This is a publication of the Labour & Employment Group.

Please direct questions or suggestions to:

**New Brunswick**
Trisha Gallant-LeBlanc
tgallant-leblanc@coxandpalmer.com
506.462.4764

**Newfoundland & Labrador**
Chris Peddigrew
cpeddigrew@coxandpalmer.com
709.570.5338

**Nova Scotia**
Andrew Taillon
ataillon@coxandpalmer.com
902.491.4209

**Prince Edward Island**
Alanna Taylor
ataylor@coxandpalmer.com
902.629.3921

This Cox & Palmer publication is intended to provide information of a general nature only and not legal advice.