

Benefits during the notice period

Employers should be aware that not only is the statutory minimum notice usually not good enough, but it involves more than just wages

BACKGROUND

THE VARIOUS employment acts and codes across the country set out the minimum statutory requirements for providing termination notice or pay in lieu of notice. The required minimum statutory notice period will range from one to eight weeks, depending on the length of service of the employee and the province.

Courts will almost always award more in a successful wrongful dismissal suit than the minimum required by statute, known as the common law amount. But what are an employer's legal obligations during the notice period besides payment of wages?

BY LISA STAM

As every HR professional already knows, terminating an employee's employment without cause in Canada comes at a price. And termination "for cause" is almost always impossible in the absence of fraud, violence, or selling the owner's first-born child.

Employment statutes in Canada require an employer to pay wages or salary for the notice period, as well as to continue benefit contributions. In Ontario, for example, the Employment Standards Act requires an employer to continue the employee's wages and to "continue to make whatever benefit 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."

Statutory notice period obligations, therefore, include the continuation of whatever benefits the employee was otherwise entitled to, including benefits such as group health care and dental premiums, life insurance, long-term disability (LTD), short-term disability (STD), and travel insurance. When crafting a termination package for an employee who has been terminated without cause, the package must include the continuation of benefits throughout the statutory notice period.

The problem employers run up against is that most insurance companies recognize the statutory obligations for general benefits like health care and dental, but often refuse to insure the bigger ticket items like LTD or life insurance after an employee's last day of active employment.

Ultimately, it is the employer who is legally obligated to provide benefits to the employee during a notice period, not the insurer. The insurer is simply obligated to satisfy the terms of the contract with the employer.

The gap between what is required and what is actually insured during the notice period becomes even greater for the common law notice period. Canadian employment statutes set out minimum employment standards. The courts will almost always award significantly more common law damages than the statutory minimum for a wrongful dismissal suit, depending on factors such as the length of the employee's service, the employee's age, and the type of work the employee performed.

The case law makes it clear that an employer is required to make the employee whole for the entire common law notice period. In other words, the employee will be entitled to whatever she would have earned had the termi-

nation not occurred. This includes, for example, any regularly scheduled wage increases, non-discretionary bonuses tied to company performance, and the continuation of all benefits.

Enter the release

Upon a without-cause termination, the employer will offer a settlement package. The parties have the freedom of contract to sign off on a settlement that is greater than statutory minimums, but not as generous as common law, including some restrictions around benefits. This is the solution most often used to resolve the benefits dilemma.

However, in the absence of a binding employment contract or an executed settlement release, the employer is exposed to the employee suing for wrongful dismissal (even after receiving a modest package) and the final details landing in the hands of the judge, who will typically be more generous than the employer.

The insurance gap

If the insurance company refuses to continue to insure the terminated employee beyond the statutory notice period and the parties don't sign off on a release, the employer

is on the hook if the terminated employee needs to access the benefits during the common law notice period, after the statutory termination notice period expires.

As an example, in *Egan v. Alcatel Canada Inc.*, the Ontario Court of Appeal upheld the notice period of nine months awarded to a director-level, senior management employee with 21 months service (she was induced from prior employment). The employee was terminated without cause in July as part of a mass termination, and in November she was diagnosed with a major depressive disorder. The statutory notice period was long over when the disability arose, and all benefits, including STD and LTD, had been cancelled at the end of the statutory notice period. The employee was denied disability benefits when she applied during the common law notice period because the coverage had already been cancelled.

A particular problem for the employer was that the STD and LTD policies provided that the employer, not the insurer, determined when coverage was to be terminated. The Court of Appeal upheld the trial judge's finding that because the disability arose during the notice period, and because the employer "wrongful-

ly discontinued her coverage prior to the onset of disability,” the employer was therefore liable for any resulting loss. The employer was liable for the value of the disability benefits that would otherwise have been paid — not just the benefit premiums.

Also important to note in *Alcatel* was that the employer’s obligations actually exceeded the awarded notice period. The court held that the employee was entitled to damages for the entire period of disability, regardless of when the notice period ended. In this case, the disability ended when the employee recovered six months after the notice period ended. The end result was that the employer was found liable for \$146,825.98, plus costs of \$25,000 to the former employee.

The employer got lucky here. Had the employee not recovered from her disability, the amount would continue for the length of time the insurance policy would have covered her, had the policy not been terminated during the notice period. This employee was 40 years old — there could have been another 25 years of liability.

In *Brito v. Canac Kitchens*, a 55-year-old employee became permanently disabled. After 24 years of service, the employer terminated the employee, paid him the minimum statutory entitlements (32 weeks) and extended benefits for the minimum statutory period (the first eight weeks). The employee partially mitigated his losses by finding a new job, but the new employer did not offer disability coverage. About a year-and-a-half into the new job, the employee was diagnosed with cancer of

the larynx. The employee underwent extended treatment including several surgeries, chemoradiation and insertion of a tracheostomy tube.

The employee eventually sued his first employer for wrongful dismissal and associated benefits, including LTD and STD benefits that he would have received had the benefits not been cancelled at the end of the statutory notice period. The court awarded the employee damages for lost income for 22 months, STD benefits for 17 weeks, and LTD benefits to age 65, plus legal costs. To be clear, the employee was awarded not just the monthly benefit premiums, but the cost of the underlying benefits themselves for 10 years.

This was all at a price tag to the employer of over \$200,000, plus \$125,000 for costs at trial. The \$15,000 of punitive damages was reversed on appeal, but the appeal court awarded the employee a further \$20,000 for costs. The total cost of maintaining the monthly benefit contributions for the full 22 months would have been under \$10,000, without having to pull in any lawyers.

Some employers are reluctant to continue the “expensive” premiums during a notice period and are willing to gamble that the employee will stay well. But should anything happen to the terminated employee during the common law notice period and there is no executed release, as the above cases indicate, those premiums all of a sudden look like a bargain.

Contracting out of the statute

A proactive way to avoid the above scenarios is to enter into an

employment contract when the employee starts. While this doesn’t solve the problem of a 20-year employee who started at the company without an employment contract, it does provide clarity for new and future employees. The vast majority of employment law cases are disputes around termination entitlements, and a reasonable and clearly drafted termination provision can usually avoid the problem upfront.

Provided the parties exceed the minimum statutory standards for termination and severance payments, the termination provision can carve out and contain the entitlements on termination. For example, if the contract provides three weeks of salary for every year of service, it is permissible for the contract to then provide that benefits will cease two months after the last day of active employment.

Case law continues to emphasize the importance of expressly stating the time period during which benefits will be continued. Earlier this year, in *Wood v. Deeley Imports*, the Ontario Court of Appeal set aside a contract termination provision that failed to expressly provide for benefits during at least the minimum statutory period (see page 1 story). Rather, the termination provision stated that the employee would get two weeks for each year of service, and that the “payments and notice period provided for in this paragraph are inclusive of your entitlement to notice, pay in lieu of notice and severance pay pursuant to the *Employment Standards Act, 2000*.”

The court held that on its plain

wording, the clause excluded the employer’s obligation to contribute to the employee’s benefit plans during the notice period. The court rejected the employer’s arguments that the obligation is implied, and because the employer did pay the benefit contributions, the statute was not breached. The court found that the actual contributions to benefits should have no bearing on whether the termination clause itself contravenes the statute. In other words, an employer cannot correct the defect after the fact.

Should you contract out of providing benefits during the notice period?

As long as the provision in the employment contract exceeds the statutory minimum, freedom of contract prevails. From a practical point of view, however, if the insurance company permits, providing benefits during the full contractual notice period is often highly desirable for the employee, especially if he has a family or health issues. For the employer, continuing to pay monthly premiums may be a small price to pay for a co-operative former employee who doesn’t try to challenge the contract on some other basis.

For more information see:

- *Egan v. Alcatel Canada Inc.*, 2006 CarswellOnt 28 (Ont. C.A.).
- *Brito v. Canac Kitchens*, 2012 CarswellOnt 760 (Ont. C.A.).
- *Wood v. Fred Deeley Imports Ltd.*, 2017 CarswellOnt 2408 (Ont. C.A.).