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Employment Update

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WHAT ARE AN EMPLOYER'S OBLIGATIONS TO A TERMINALLY ILL EMPLOYEE?

Mark E. Geiger

It is generally recognized that a serious and long-term illness that prevents an employee from being able to work can eventually result in the "frustration" of the employment contract. Determining the point where frustration occurs is rarely easy. However, the situation can become even more complicated if the employee is suffering from a potentially terminal illness. The recent decision of the Ontario Superior Court of Justice in *Estate of Cristian Drimba v. Dick Engineering Inc.*, 2015 ONSC 2843 (CanLII) illustrates those complications.

The case dealt with Mr. Drimba and his employer, Dick Engineering. Mr. Drimba began working for the engineering firm in question in 1996. In May 2013, his gross salary was approximately $60,000. On May 22, 2013, he advised Dick Engineering that he had shingles and would be away for up to six months. In June 2013, he was unfortunately diagnosed with terminal cancer and commenced a leave of absence. Less than two months later, the assets of Dick Engineering were sold, but Dick Engineering continued as a corporate entity.

On August 29, 2013, Mr. Drimba was advised in writing that his employment would continue until such time as he was well enough to return to work, and that upon his return to work Dick Engineering would arrange for him to have an interview with the purchaser of the assets. Mr. Drimba died on September 17, 2013. His estate commenced an action for wrongful dismissal against Dick Engineering and then brought a motion for summary judgment.

The Court found as a fact that Mr. Drimba had not been terminated by any act of the employer and that he had not been constructively dismissed. However, the Judge hearing the motion advised counsel that in his view there could be a basis for a claim for statutory termination pay and statutory severance pay under the *Employment Standards Act, 2000* (the "*ESA*").

Relevant Provisions of the ESA

Section 54 of the ESA provides that:

> No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer, [emphasis added]
>
> (a) has given to the employee written notice of termination in accordance with section 57 or 58 and the notice has expired; or
>
> (b) has complied with section 61.

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Section 57 of the *ESA* sets the amount of notice that must be given upon termination, while section 61 permits an employer to provide pay in lieu of notice.

Subsection 63(1) of the *ESA* provides as follows,

> An employer severs the employment of an employee if, [emphasis added]
>
> (a) the employer dismisses the employee or otherwise refuses or is unable to continue employing the employee;
>
> (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response within a reasonable period;
>
> (c) the employer lays the employee off for 35 weeks or more in any period of 52 consecutive weeks;
>
> (d) the employer lays the employee off because of a permanent discontinuance of all of the employer's business at an establishment; or
>
> (e) the employer gives the employee notice of termination in accordance with section 57 or 58, the employee gives the employer written notice at least two weeks before resigning and the employee's notice of resignation is to take effect during the statutory notice period.

Section 64 provides that an employer who severs an employment relationship with an employee shall pay severance pay to the employee.

It should be noted that in both cases, an act of either termination or dismissal on the part of the employer is required in order for the employee to be entitled to notice of termination, termination pay or severance pay.

Regulation 288/01 under the *ESA* provides that an employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitist or unforeseen event or circumstance is not entitled to either termination pay or severance pay.

However in *Ontario Nurses' Association v. Mount Sinai Hospital*, 2005 CanLII 14437 (ON CA), a nurse was terminated from Mount Sinai Hospital because of a disability. The hospital took the position that her disability resulted in the frustration of her employment contract. Under the provisions of the *ESA* as it was then, she was therefore disentitled to both statutory termination pay and statutory severance pay. However, the Ontario Nurses Association challenged the constitutionality of that provision of the *ESA*, claiming that it was a violation of the Canadian Charter of Rights and Freedoms and amounted to discrimination on the basis of disability. The Ontario Court of Appeal agreed with that argument and as a result the *ESA* was amended so that in situations where the employment contract was frustrated as a result of an illness or injury, the employee did not become disentitled to statutory termination pay and statutory severance pay.

Frustration in the Case of a Terminally Ill Employee

In the case of Mr. Drimba, the Court reviewed the provisions of the *ESA* and the applicable regulation and found that Mr. Drimba's employment had been frustrated after he had gone on the leave of absence but before he died. The Court therefore concluded as follows:

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> While it is obviously not possible to pinpoint the precise date at which Mr. Drimba's contract of employment became frustrated, it was undoubtedly at some point between June 7, 2013, and September 17, 2013, his date of death.
>
> Accordingly, Mr. Drimba's contract of employment became frustrated before he died. He became entitled to both termination pay and severance pay under the *Employment Standards Act*. His estate is now so entitled."

The analysis in this decision could potentially cause difficulties for employers when faced with an employee suffering from a serious illness. The Court found that the contract had become frustrated due to illness at an unidentified point in time, despite no steps having been taken by the employer to either terminate or sever the employment relationship. It is difficult to distinguish Mr. Drimba's case from other situations which would not result in a requirement to pay statutory termination or statutory severance pay, such as where an employee dies unexpectedly while still employed. One interpretation of the decision is that it depends on a circular argument, in that the employee's death due to illness is relied upon as evidence that the illness frustrated the contract of employment at some point prior to the death. However, that analysis would seem to contradict sections 54 and 63 of the *ESA*, which require a dismissal or termination by the employer.

Unless it is appealed, there is a strong likelihood that the Employment Standards Branch of the Ministry of Labour and the Ontario Labour Relations Board will consider the decision in *Drimba* to be binding on them. It remains to be seen how the decision will be applied to difference fact scenarios. ■

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