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CRAWFORD CHONDON & PARTNERS LLP

Management Labour and Employment Lawyers

THE EMPLOYERS' Edge

# Employers No Longer Entitled to Argue Frustration of Contract Due to Disability Under the ESA

At common law, where an employer establishes that an employee's disability prevents him or her from carrying out employment duties, and accommodation pursuant to human rights legislation cannot be accomplished without causing undue hardship, the employer can treat the employment relationship as at an end due to frustration of contract. This would include excusing the employer from providing the employee with reasonable notice of termination.

Regulations under the Employment Standards Act, 2000 (the "ESA"), had provided a similar exemption to the obligation to provide termination notice on the basis that an employee's disability or illness had frustrated the employment contract, subject to the duty to accommodate under the Ontario Human Rights Code. In a recent move that received no media attention, the Ontario government amended Regulation 288/01 under the ESA to eliminate this exemption.

This amendment was apparently prompted by the Ontario Court of Appeal's decision in Ontario Nurses Association v. Mount Sinai Hospital, which held that the ESA's provisions which allowed employers to refuse to pay severance pay to employees whose disability frustrated the employment contract were contrary to the Ontario Human Rights Code (see the Spring/Summer 2005 edition of The Employers' Edge for a review of the Mount Sinai decision). The government's recent amendment extends well beyond the Court of Appeal's decision which dealt solely with the issue of frustration as it related to severance pay, not termination notice or pay.

Practically, this significant regulatory change means that employers will be required to provide notice of termination or pay in lieu of notice, to employees whose disability or illness prevents them from attending work or carrying out their employment duties, and where there is no reasonable prospect of those employees resuming employment in the foreseeable future.

However, it should be noted that this amendment only applies with respect to the ESA and the obligation to provide the statutory minimum notice of termination. It does not affect the concept of frustration under the common law. Accordingly, employers are still entitled to assert that, as a result of frustration of the employment contract, a dismissed employee is not owed reasonable notice of termination in excess of statutory minimums.

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# Failure to Reinstate After Pregnancy Leave

## OLRB Clarifies Purpose of "Wild-Card" Head of Damages

Most employers know that the failure to reinstate an employee returning to the workplace after a pregnancy or parental leave can result in significant financial liability. One potential liability that has been particularly controversial is the award of compensation for the employee's loss of reasonable expectation of continued employment ("Loss of Job Damages)". A recent decision of the Ontario Labour Relations Board (the "Board") provides some useful clarification of the purpose of this award and the circumstances in which it should be awarded, while also serving as a reminder to employers of the significant obligation to reinstate under the *Employment Standards Act, 2000* ("ESA").

In or about May 2003, Dawn Little took maternity leave. When she returned to work in May 2004, she was advised by her employer, Sandtastik Inc. that her administrative position no longer existed because the business had suffered a serious decline. Instead, Ms. Little was assigned to do more manual labour type work. A complaint to the Ministry of Labour followed in which Ms. Little alleged that Sandtastik had breached its statutory obligation to return her to the administrative position she occupied prior to her leave. The investigating officer found that there was in fact a breach and awarded, among other things, $19,433.04 for Loss of Job Damages.

On review, the Board agreed with the officer's finding that the company had reprised against Ms. Little by failing to reinstate her. Although the business legitimately experienced a decline, Ms. Little's position still existed because the company had simply redistributed her responsibilities to other employees.

The Board then considered whether the award for Loss of Job Damages was reasonable. According to the Board, the purpose of this award is to compensate the employee for the loss of the job itself, recognizing that there is some inherent value in having a job. In this regard, the award is different from damages in lieu of reasonable notice, which serve to compensate for an actual loss. Previous ESA decisions seemed to suggest that, as a "rule of thumb", complainants could expect to receive one month's pay for each year of service as Loss of Job Damages. The Board indicated that the propriety of granting Loss of Job Damages should be assessed on a case-by-case basis; these damages should not be awarded simply as a matter of course. Furthermore, prior to awarding such damages adjudicators and investigation officers are obliged to determine whether or not it is possible to reinstate the employee. Reinstatement, with compensation for loss of wages to the point of reinstatement, should always be the first remedial choice. In circumstances where reinstatement is not feasible, Loss of Job damages would be appropriate. However, where reinstatement is possible but is not sought by the complainant, an award for Loss of Job Damages would not be appropriate. Finally, where the complainant has found alternative employment, Loss of Job Damages should be reduced by the amount earned in the new employment.

**Loss of Job Damages are not to be awarded as a matter of right where reinstatement is feasible.**

With respect to Ms. Little's situation, the Board indicated that the officer should have explored the possibility of reinstatement at the time the Order was made. However, at the time of the Board hearing reinstatement was not appropriate and, therefore, Ms. Little was awarded $1,500.00 for Loss of Job Damages. This amount represented the $150.00 net difference in income between her job at Sandtastik and her new job, multiplied by the 10 months from the end of her employment to the end of the month of the hearing.

In summary, the Board has made clear that ESA officers should be looking at reinstatement as an appropriate order. Loss of Job Damages are not to be awarded as a matter of right where reinstatement is feasible. Furthermore, despite the "make whole" character of Loss of Job Damages, employees who obtain alternative employment will have these damages offset by any replacement earnings.

# Emergency Leave Update

*OLRB sheds light on emergency leave provision: Doctors notes equivalent to a "self report" not "evidence reasonable in the circumstances"*

We report on a recent decision by the Ontario Labour Relations Board ("OLRB") that supports an employer's right to insist upon meaningful and specific evidence when an employee seeks to invoke the protections of the emergency leave provisions under the Employment Standards Act ("ESA"). In Honda of Canada, Mfg. ("Honda") and Nathan Moroz ("Moroz"), Vice Chair Christopher Albertyn held that a doctor's note dated at the conclusion of an employee's absence was equivalent to a "self report" and was not "evidence reasonable in the circumstances" for purposes of entitlement to emergency leave under the ESA.

Like many employers, Honda maintains an attendance management program ("AMP") in which an employee's failure to maintain acceptable attendance at work will result in the initiation of a process of counseling. Counseling commences at Level 1 and proceeds through to Level 4 if the employee's attendance does not improve or deteriorates. As an employee progresses through the levels, he or she is provided with written counseling and advised that for each subsequent absence due to illness, he or she must provide a medical note dated during the absence and covering the full period of the absence. Approved emergency leave days are not counted as absences for purposes of Honda's AMP.

Moroz was unable to maintain acceptable attendance and in 2003 he had progressed to the final stage of the AMP. In early 2004, Moroz was absent from work for 4 consecutive days due to purported migraine headaches. Upon his return, Moroz submitted a doctor's note dated the same day as his return which indicated that he had not sought medical attention during the period of his absence. Honda determined that: Moroz had not established an entitlement to emergency leave; the absences were subject to the AMP; and his employment should be terminated in accordance with the terms of the AMP. Moroz filed an ESA complaint alleging that he had been improperly denied emergency leave and terminated for attempting to take the leave.

Under section 50 of the ESA, employees are entitled to 10 days of protected leave per calendar year for specified reasons. One of the specified reasons is a personal illness, injury or medical emergency. To be entitled to emergency leave, an employee is required to advise his or her employer of the intention to take the leave, either in advance of taking the leave or as soon as possible after commencing it. As well, the employer is entitled to ask the employee to provide "evidence reasonable in the circumstances" that the employee is entitled to the leave.

Following his investigation, the Employment Standards Officer ("ESO") found that the Company improperly denied Moroz's right to emergency leave and had committed a reprisal against him by terminating his employment. In the ESO's view, it was not reasonable in the circumstances for Honda to insist that Moroz provide a medical note during the period of his absence. The ESO also found that it was not reasonable for Honda to insist that the doctor's note indicate that Moroz was unable to work due to his illness. The

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## Upcoming Events

March 1, 2006
David Chondon
The Canadian Institute

Labour & Employment Law for the Construction Industry
"What's New in Sale-of-Business and Related-Employer Applications"

May 16, 2006
Crawford Chondon & Partners LLP
The Employers' Choice

2nd Annual Employment Law Forum
*Our second annual Employment Law Forum is a "must attend" full day seminar which has been specially designed to bring employers up-to-date on the latest developments in labour and employment law. The seminar will provide effective and practical strategies to minimize the risk and liability that can result from workplace related issues. Registration information will follow shortly. We look forward to seeing you there!*

CRAWFORD CHONDON & PARTNERS LLP

Management Labour and Employment Lawyers

Effective January 1, 2006, we are pleased to announce that our new firm name is Crawford Chondon & Partners LLP. While our location remains unchanged, we do have new email addresses and a new, updated website at www.ccpartners.ca. We are excited about the changes that will be implemented in the new year which will enhance the already high level of service that we provide to our clients.

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officer awarded over $32,000 in damages.

On review before the OLRB, Vice Chair Albertyn made two key findings. First, it was not unreasonable in the circumstances for Honda to require Moroz to submit medical evidence dated during the period of absence and which covered the entire period of the absence. The documentation that was submitted, being dated on the day of Moroz's return, was tantamount to a self report and it was open to Honda to reject it. As stated by the Vice Chair: "His producing a medical report after his absence, concerning the state of his health prior to his medical examination, was a self report because he was not examined by a doctor during the period of his absence. It was not unreasonable, in my view, for the Company to regard the report as insufficient, given Mr. Moroz's absence record".

Secondly, the Vice Chair held that the "mere application of the [AMP] to Mr. Moroz" could not be considered a violation of section 74, the reprisal provisions of the ESA. For a reprisal to have occurred, Moroz had to have been terminated because he exercised or attempted to exercise his right to an emergency leave. This was not the case with respect to Moroz; he was terminated because he failed to live up to his attendance obligations.

In the result, the ESO's Order to Pay was set aside in its entirety and all monies paid in trust by Honda to the Director were ordered to be returned, with interest.

Honda v. Moroz is an important decision in the limited though evolving jurisprudence with respect to emergency leave entitlement under the ESA. Though driven by the particular circumstances applicable to Moroz, the case suggests that when dealing with a serious attendance management problem, employers are not obliged to accept medical documentation that does not specifically indicate that the employee has been examined by a medical practitioner while absent and certified medically unfit to report for work for a period of time.

# Broad Interpretation of "Reprisal" Under the ESA Leads to Employer Liability

*Fleetwood Canada Limited* is a recent arbitration decision which found that a perfect attendance bonus plan that did not include within a list of permissible absences, an employee's entitlement to emergency leave under the *Employment Standards Act, 2000* ("ESA"), was a penalty contrary to the "reprisal" section of the ESA.

Fleetwood's bonus plan sought to reward employees for maintaining perfect attendance. The bonus was paid on a weekly basis and certain absences, such as a medical emergency, would not be used to disentitle the employee from the bonus. However, non-medically related absences that fit the definition of "emergency leave" under the ESA could be used to disentitle employees from the bonus. The issue was whether or not the employer's refusal to include emergency leave days within the list of permissible absences, constituted a reprisal under section 74 the ESA. Section 74 prohibits employers from intimidating, dismissing or otherwise penalizing an employee because he or she exercised or attempted to exercise his or her rights under the ESA.

Fleetwood argued that it was entitled to exclude emergency leave days from the list of permitted absences because work driven benefits may be tied to work performance. The Ontario Court of Appeal in the Orillia Soldiers Memorial Hospital case held that an employer does not discriminate against an employee when it withholds a work driven benefit from an employee who is absent due to pregnancy/parental, illness or another protected leave. The Court of Appeal found that it was not discriminatory to require an employee to attend work in order to receive some form of compensation.

The arbitrator rejected Fleetwood's argument. In her view, the Fleetwood case did not concern a claim for compensation for days not worked, but rather "relief from a disentitlement to the bonus if an Emergency Leave Day is taken". Furthermore, according to the arbitrator the element of discrimination under the Ontario Human Rights Code that was considered in the Orillia Soldiers case was inapplicable to the Fleetwood situation which considered the concept of reprisal under the ESA.

In the result, the arbitrator found that to the extent that an employee is disentitled to the weekly bonus because he or she took a statutory emergency leave day, that person would experience a negative consequence or loss. Accordingly, by failing to include emergency leave days within the list of exceptions Fleetwood was effectively discouraging employees from exercising their statutory rights. This constituted a reprisal under section 74(1) of the ESA.

> Any action by an employer that has the effect of discouraging employees from exercising their rights under the ESA will constitute a reprisal.

The Fleetwood decision underscores the broad interpretation that is given to section 74(1) of the ESA. The decision suggests that any action by an employer that has the effect of discouraging employees from exercising their rights under the ESA will constitute a reprisal. In other words, a reprisal does not require a finding that the employer intentionally retaliated against the employee in a bad faith manner.

Crawford, Chondon & Partners LLP will continue to monitor the development of this evolving area of the law. In the interim, in order to avoid potential liability employers should give careful consideration to whether their policies, programs and incentives could have the effect of discouraging employees from exercising their rights under the ESA.

# A Tax By Any Other Name…Revisited

In previous editions of *The Employers' Edge* we have discussed the lively arbitral debate that is unfolding as to whether or not the Ontario Health Premium ("OHP") is properly seen as a "premium" (which employers may have to pay pursuant to collective agreement provisions where employers committed themselves to paying the now non-existent OHIP premiums) or a "tax" (which employees would pay via payroll deductions from their incomes).

Published reports indicate that a majority of more than 20 arbitration awards that have considered the OHP issue have concluded that the employer is not obligated to pay it. Despite the preponderance of arbitral opinion, a recent decision of the Ontario Divisional Court has unanimously upheld an arbitration award that interpreted the OHP as payable by the employer pursuant to existing collective agreement language that required the employer to pay OHIP premiums.

While the decision is clearly troubling for employers, it is important to place the decision in its context. First, in Ontario the Court's jurisdiction in reviews of arbitration awards is limited to assessing whether the decision was "patently unreasonable", not whether it was "correct". In other words, so long as the arbitrator's decision was "not clearly irrational", it would be upheld even if the Court itself believed that it was an incorrect decision. In practical terms, this means that the Court's decision did not establish that the arbitrator's decision was correct, thus future arbitrators have jurisdiction to decide for themselves whether the OHP is properly seen as a premium that is payable by employers.

Second, it goes without saying that the decision would only be relevant to those employers that have language in their collective agreements that imposes upon them the obligation to pay OHIP premiums. Because OHIP premiums have not existed since the 1989 introduction of the Employer Health Tax, presumably most recent collective agreements would not have such language.

Nonetheless, employers are advised to exercise caution when faced with Union demands to include OHP or OHIP language in their collective agreements.

The lawyers at Crawford, Chondon & Partners LLP will continue to monitor the debate over this issue and will advise of any significant developments that occur in the future.

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