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All Notice and No Work Makes "Working Notice" Null and Void

A recent decision of the Ontario Superior Court of Justice confirms that an employer cannot discharge its notice obligations if the employee is unable to actually work during the notice period.

Background

In *McLeod v 1274458 Ontario Inc.*[1] McLeod suffered a non-work-related car accident in September 2015, resulting in an unpaid leave of absence. In January 2016, while on his leave of absence, McLeod received notice that the employer was ceasing operations at the end of July and that he would be dismissed. The following six months were to serve as his working notice period. McLeod remained on medical leave, returning to work on light duties only four days before the shutdown. On termination, he commenced an action for wrongful dismissal.

Decision

The Court held that since McLeod was incapable of working when he received the notice of termination, working notice was not appropriate. The Court also rejected the employer's argument that McLeod's medical documentation was insufficient to support an ongoing absence, when it had accepted that documentation during the course of his leave of absence.

[1] 2017 ONSC 4073.

The Court applied the *Bardal* factors to determine the appropriate reasonable notice period. McLeod was 43 years old, with 18 years of service with the Company. Addressing the Company's argument that McLeod was entitled to less notice because of his lack of special training or qualifications, Justice Hood noted that "in today's world and economy… [t]hose with skills and specialties change jobs frequently and rapidly. Those without skills and specialties, I believe, find it more difficult to find employment."[2] He held that the appropriate notice period was 12 months. This was reduced to 9 months when McLeod secured a new job.

What Employers Should Know

The main implication from *McLeod* is that working notice is not appropriate in cases where an employee is on a medical leave of absence. One of the purposes of working notice is to bridge the gap between termination and finding new employment and an employee incapable of returning to work cannot be reasonably expected to undertake a search for new employment. *McLeod* shouldn't stop employers from providing working notice to absent employees in circumstances of closures as an employee may return to work during the working notice period and the employer will be able to take credit for the period that the employee did work.

Two other important points should be taken from the decision. First, an employer cannot accept medical documentation submitted during employment and later challenge its validity in court. Where an employer has reserved the right to terminate an employee who does not present proper documentation, and the employer chooses not to terminate that employee, the employer is deemed to have accepted the medical documents. In a working notice situation, it is important to ensure that an employee is not delaying his or her return to work, so focusing on the medical documentation is important.

[2] *McLeod*, at para 30.

Second, Justice Hood's comment on low-skilled work is important to note. In 2011, the Ontario Court of Appeal in *Di Tomaso v Crown Metal Packaging Canada LP* held that character of employment was of declining importance.[3] In our recent bulletin on the *Skov* decision, we reported that character of employment continues to retain some relevance in reasonable notice cases. This latest decision continues the Ontario courts' movement away from treating administrative and lower skilled positions as being deserving of less notice than higher skilled and more managerial positions.

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[3] 2011 ONCA 469, at paras 23, 27, 28.