Should Employee on Disability Get Termination Notice?

By Glenn Demby

According to Statistics Canada, it takes the average employee between 13 and 23 weeks to land a new job (2011 figures). The termination notice employers must pay under provincial employment standards laws offsets part of the financial losses employees suffer when they get fired. But termination notice doesn't last forever and employees are expected to find a new job eventually. But suppose the fired employee isn't *capable* of ever working again. Should the fact that he isn't transitioning to new employment disqualify him from receiving termination notice?

THE CASE

What Happened: In 2007, a truck driver got hurt in a traffic accident and had to go on leave. Four years later, with no prospects of a return, the company treated his employment as over. During severance negotiations, both sides agreed that the driver's disability "frustrated" his contract and constituted grounds for termination. But they disagreed on termination notice. The point of termination notice under the Ontario ESA is to help employees find a new job, the company claimed. And since the driver *couldn't* work any more, he didn't qualify for notice.

What the Arbitrator Decided: The Ontario Labour Arbitrator ruled the driver was entitled to termination notice.

How the Arbitrator Justified Its Decision: The arbitrator cited 3 reasons:

What ESA says: Section 60(1)(b) of the Ontario ESA says that during each week of the notice period, employers must pay employees notice of "no less than his or

her *regular* wages for a regular work week." The ESA *doesn't* say that employees only get notice if they would have actually worked those weeks.

What regulations say: The arbitrator also cited the part of the ESA regulations listing the categories of employees who *aren't* entitled to termination notice. That list includes employees whose employment contract is "frustrated" by an "unforeseeable event or circumstance," the arbitrator acknowledged. But, it quickly added, the exclusion doesn't apply if the reason the contract is frustrated is an illness or injury to the employee.

No workers' comp/termination notice double dipping: The arbitrator also pooh poohed the argument that it'd be a windfall to let the driver get both termination notice and income replacement benefits from the WSIB (since workers' comp covered the driver's injury) at the same time. The fact that the driver might end up getting more benefits than what his income would have been during the notice period "isn't sufficient reason" to deprive him of the termination notice the ESA said he was entitled to, reasoned the arbitrator.

Wright Grievance, [2012] O.L.A.A. No. 246, May 14, 2012

ANALYSIS

Termination notice is designed to furnish employees replacement income while transitioning to a new job. But as the *Wright* case makes clear, that's not its *sole* purpose. More to the point, *Wright* reaffirms the notion that being able to actually work isn't a prerequisite to receiving termination notice under ESA.

The reason this reaffirmation is so important is that 2 years ago, a federal arbitrator suggested that an employee might *not* be entitled to termination notice because he: a. was physically unable to work; and b. received other benefits after severance [*Cargill and VFCW, Local 175 (Biggs),* (2010) 201 L.A.C. (4th)].

Wright is the first case to directly address these issues since *Cargill*. So the fact that *Wright* decisively and expressly (the arbitrator specifically mentions *Cargill* by name) rejects the employees-must-actually-be-able-to-work-to-get-notice theory is very significant and heads off what could have been a watershed change in the rules of termination notice.

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