

LABOUR AND EMPLOYMENT LAW

Be careful discontinuing an employee's disability coverage after termination

By Ainslie Benedict



Employers may wish to reassess the common practice of discontinuing a terminated employee's short- and long-term disability coverage at the end of

the minimum notice period specified in provincial employment standards legislation. In a recent decision, the Ontario Court of Appeal confirmed that an employer who had continued group insurance coverage only during the statutory notice period mandated by the *Employment Standards Act* was liable for paying disability benefits when a terminated employee became disabled during her reasonable notice period: *Egan v. Alcatel Canada Inc.*, [2006] O.J. No. 34.

In 2000, Mary Egan was recruited into a managerial position at Alcatel after almost 20 years of continuous employment with the Bell Canada family of companies. At the time she moved

to Alcatel, she was 40 years of age and was earning \$85,000 annually, plus benefits.

Two of Egan's former colleagues at Bell, who had moved to Alcatel, encouraged her to seek employment with Alcatel and then recommended her to an executive at the company. Unbeknownst to Egan, the two employees shared an \$8,000 bonus paid by Alcatel when she was hired.

Egan asked for and received an annual base salary of \$125,000 from Alcatel, which she felt she needed to make up her pension loss at Bell Canada. She also received a \$5,000 signing bonus. Shortly after commencing her new

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Could be deemed insurer

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employment, her base salary was increased to \$135,000.

In July 2002, after a period of employment of less than 21 months, Egan was dismissed as part of a mass termination. She was given 12 weeks salary in accordance with the Ontario *Employment Standards Act*. Alcatel offered additional compensation in exchange for a full and final release. In the termination letter, Alcatel advised Egan that she would remain covered for group insurance benefits, including short- and long-term disability, until the end of the 12-week statutory notice period.

Subsequent to her dismissal, Egan became ill. By Oct. 1, 2002, approximately 13 weeks after her

termination and one week after Alcatel had discontinued her insurance coverage, Egan was totally disabled. She remained disabled for a period of one year.

Egan sued for wrongful dismissal. Part of her claim was for losses incurred as a result of Alcatel's failure to maintain her disability insurance throughout the reasonable notice period.

The trial judge concluded that, notwithstanding Egan's relatively short period of employment with Alcatel, the reasonable notice period was nine months. The trial judge noted that in *Wallace v. United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 (S.C.C.), the Supreme Court of Canada had confirmed that one of the additional factors that could tend to lengthen the period of reasonable notice was inducement from

secure employment. He concluded that Egan had been "encouraged" by Alcatel and its employees to leave Bell Canada and that this constituted inducement.

The trial judge found that Egan was not entitled to damages for her lost disability insurance benefits, which he concluded would have amounted to a double recovery.

Alcatel appealed the trial judge's award of a nine-month notice period based on Egan's less than two years of employment. Egan cross-appealed the dismissal of her claim for lost disability benefits.

With respect to the finding of inducement, the Court of Appeal indicated that the trial judge's use of three different words in relation to the actions of Alcatel — "encouraging", "inducements" and "enticed" — "can only lead and did lead to confusion". The court nonetheless agreed that Egan had been induced to join Alcatel and

that a nine-month notice period was appropriate in light of her 20 years of service with Bell Canada and her almost two years at Alcatel.

The court agreed with the trial judge that Alcatel was responsible for maintaining Egan's disability insurance coverage throughout the nine-month notice period. It also concluded that Alcatel was liable to Egan for the disability benefits she would have received had she been properly covered during the notice period.

The Court of Appeal ordered Alcatel to pay Egan's salary for 13 weeks, from her termination date until the date on which she became disabled, and then to pay her an amount equivalent to the disability benefits under her group coverage (an amount less than her full salary) until she recovered one year later.

The court ordered that the short- and long-term disability

payments component of the damages should be grossed up to compensate Egan for the fact that the damages for wrongful dismissal paid by Alcatel were taxable, whereas payments from her insurance company would not have been.

As a result of this decision, employers who fail to maintain short- or long-term disability coverage throughout the reasonable notice period will be deemed to have stepped into the shoes of the disability insurer. If a former employee becomes disabled during the reasonable notice period, the employer may find itself responsible for paying the disability payments until the employee recovers or, potentially, to age 65.

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