



# What's New in HR Law

## Ontario Court Finds Employee Terminated While on Medical Leave of Absence Entitled to Pay in Lieu of Working Notice

November 30, 2017

### **BOTTOM LINE**

The Ontario Superior Court of Justice concluded that an employee on a medical leave of absence should be given pay in lieu of working notice if terminated.

### **Facts: Mover involved in non-work related car crash and was unable to return to work**

On September 18, 2015, the employee, who was working as a mover for the employer company, was involved in a non-work related car accident. As he was unable to immediately return to work, the employee was placed on an unpaid leave of absence.

Just over four months later, on January 29, 2016, the employee provided his employer with a medical certificate indicating that due to injuries he had sustained in the car accident, he would not be able to return to work until March 15, 2016.

Two days later, on January 31, 2016, the employer advised the employee that it would be shutting down its operations on July 31, 2016 and provided the employee with a notice of employment termination effective July 31, 2016.

The employer also advised the employee that it considered the period between January 31, 2016 and July 31, 2016 to be “working notice” of the employee’s employment termination. The notice of employment termination stated: “If you are physically able to return to your position as Mover before the Termination Date, you will continue to receive your regular wages.” The notice did not reference a return date for the employee.

Due to ongoing medical issues, the employee was unable to return to work on March 15, 2016 as his doctor’s certificate had originally stated. His employer requested – and received – further medical reports or documentation in support of the employee’s continued medical leave of absence. Between March 31 and May 30, 2016, the employer continued to request medical documentation, which the employee provided.

On July 21, 2016, the employee’s doctor cleared him to return to work. The employer accepted this recommendation and the employee returned to work on July 27 and 29, 2017. On July 31, 2016, the employer closed down its operations.

The employee sued for damages. The matter proceeded by way of summary judgment, as opposed to a trial.

### **Court’s ruling: The employer should have provided pay in lieu of working notice**

The employee argued, among other things, that working notice of his employment termination was inappropriate because he was unable to work during that period. The Court agreed.

The Court found that, because the employee was incapable of working during the notice period, he was entitled to damages equivalent to the pay the employee would have earned had he worked during that time.

Further, the fact that the employee could not work was irrelevant to the assessment of the amount of damages to which he was entitled. In so finding, the Court concluded that the employer could not accept the employee’s position that he was unable to work during the notice period and then turn around and argue at the summary judgment that the employee was obligated to prove it.

The Court awarded the employee damages equivalent to nine months’ salary between January 31, 2016 (when the employee received his notice of employment termination) and October 31, 2016 (when the employee commenced new employment), less the pay the employee received for working on July 27 and 29, and the amount of notice paid to the employee under the *Ontario Employment Standards Act, 2000*.

### **Check the Box**

When an employee commences a medical leave of absence from work, employers should seek documentation from the employee’s treating medical professionals regarding whether, or when, the employee is fit to return to work.

Employers who terminate the employment of an employee on a medical leave of absence should provide pay in lieu of working notice in respect of any part of the leave that an employee is medically unable to work.

**Forum:** Ontario Superior Court of Justice  
**Date:** June 29, 2017  
**Citation:** *McLeod v. 1274458 Ontario Inc.*, 2017 ONSC 4073

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