

## Case In Point

### Common Law Notice – Can Employers Deduct STD and LTD Payments?

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As demonstrated by the Ontario Superior Court's recent decision in [\*Diamantopoulos v. KPMG LLP\*](#) ("KPMG"), the answer to this question is still "it depends." In determining the issue, courts will look at a number of contextual factors to determine "the intention of the parties" when they entered the employment agreement.

In *KPMG*, the plaintiff commenced a sick leave for depression following a disciplinary meeting regarding her conduct and attitude. When her application for long-term disability ("LTD") benefits was denied, the employer contacted her to arrange for her return to work. It made several unsuccessful attempts to meet with the plaintiff and eventually terminated her employment when she failed to report to a scheduled meeting. The plaintiff then advised that she had been diagnosed with breast cancer and was undergoing treatment. As a result, the employer modified her severance package and continued her benefit coverage to ensure she was eligible to apply for both short-term disability ("STD") and LTD benefits.

Terminations of this kind are sometimes considered risky by employers. Indeed, the plaintiff subsequently launched an action and claimed that the employer should be liable for aggravated damages, punitive damages and intentional infliction of mental distress. The Court dismissed all of these claims and specifically found that the plaintiff had been treated with "courtesy, respect, fairness and sympathy throughout her employment."

#### The STD/LTD Deductibility Question

The plaintiff received both STD and LTD payments during her ten month notice period. In order to determine the intention of the parties with respect to the deductibility of these payments from the notice award, the Court reviewed both the employment contract and the disability policy.

The Court found that the STD payments *should* be deducted from the notice award based on the following:

- the benefits were provided as salary continuance;
- the plaintiff had not contributed directly to the cost of the benefits; and
- the costs of the benefits were absorbed by the employer as a form of self-insurance.

The Court came to the *opposite* conclusion with respect to the LTD payments. It found that the LTD payments were "disability benefits" not salary or income replacement. This conclusion was based on the following:

- the LTD payments were more in the form of private insurance payments, (the employer only paid premiums to the insurer);
- the plaintiff had contributed to the cost of the benefit; and
- the payments were made by the insurance provider directly to the plaintiff.

These conclusions are in line with other cases which have found that unless the STD/LTD benefits are self-insured by the employer, they will not be deductible. Accordingly, in situations where disability benefits are not provided through an "Administrative Services Only" Plan, employers would be wise to assume that benefit payments will *not* be deductible.