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Post-Termination Bonuses

By: Larry W. Keown

Post-Termination Bonuses:

- When employees are terminated without cause, they are owed notice or pay in lieu of notice either under the *Employment Standards Act* or at common law
- Typically "pay" includes all types of compensation including: wages, benefits, etc.
- Issues arise often, though, related to bonuses due after a termination
  - particularly where working notice is not permitted, and so an employee does not "work" or is not "actively employed" when the bonus becomes payable;
  - when bonuses are discretionary

Paquette v TeraGo Networks Inc., 2016 ONCA 618

FACTS

- The employee, Trevor Paquette, worked for TeraGo for 14 years until he was dismissed without cause
- Based on his age (49), specialized skills, upper-middle management position, length of service and the Albertan economy (where he worked), he was awarded 17 months of pay in lieu of notice under the common law
- The trial judge refused to award the bonuses that he would have received within the 17 month notice period based on the fact that the bonus plan required Mr. Paquette to be "actively employed by TeraGo on the date of the bonus payout" and that Mr. Paquette and the corporation must meet their set objectives

→ Appealed by Mr. Paquette

Paquette v TeraGo Networks Inc., 2016 ONCA 618 (cont'd)

DECISION: allowed the appeal and overturned the trial judge decision on the bonus issue:

- Paquette was awarded additional damages equal to the bonuses he would have earned in the 17 months following his termination

- Where the bonus is an integral part of the employee's compensation package, the employee is entitled to bonuses that the employee would have earned during the reasonable notice period

Paquette v TeraGo Networks Inc., 2016 ONCA 618 (cont'd)

- Damage awards should place the employee in the same financial position as he or she would have been in had such notice been given
  - *Sylvester v British Columbia*, [1997] 2 SCR 315 at para 1

Discretionary and Active Employment Bonuses

- Even if the bonus is phrased as "discretionary," if the bonus forms a significant part of the employee's compensation and has been paid over several years, it will likely be included in an employee's entitlements over the notice period
- In Mr. Paquette's case, he had received bonus payments of:
  - 2011: $27k
  - 2012: $31k
  - 2013: $27k
  - 2014: $7k

- The Court also held that the provisions of a bonus plan are important and relevant considerations in determining eligibility criteria, limitations on payment and calculations of the bonus

- In Mr. Paquette's case the bonus plan provided that:
  "an employee must be actively employed by TeraGo on the date of the bonus payout"

- But, the Court held that this provision did not assist the employer or preclude the bonus from being payable.
  - The claim for damages for bonuses is not for the bonuses themselves but compensation for the lost opportunity to qualify for a bonus because the employer did not give adequate notice of the breach of the employment contract
  - If the employee had completed the notice period via working notice, the employee would have had an opportunity to earn the bonus

Kielb v. National Money Mart 2017 ONCA 356

- Upheld a bonus plan provision:
  - "Any bonus which may be paid is entirely at the discretion of the Company, does not accrue, and is only earned and payable on the date that it is provided to you by the Company. For example, if your employment is terminated, with or without cause, on the day before the day on which a bonus would otherwise have been paid, you hereby waive any claim to that bonus or any portion thereof. In the event that your employment is terminated without cause, and a bonus would ordinarily be paid after the expiration of the statutory notice period, you hereby waive any claim to that bonus or any portion thereof. "

Singer v Nordstrong Equipment Limited, 2018 ONCA 364

FACTS:

- The employee, André Singer, was the President and General Manager of one of two divisions at the company – 53 years old making $180,000 base salary plus bonuses annually
- He was terminated without cause in December of 2016
- Mr. Singer sued and then brought a motion for summary judgment

Singer v Nordstrong

Mr Singer's past bonuses as a percentage of the company profits:

- 2010 - $56500 – 5.4%
- 2011 - $85,000 – 4.7%
- 2012 – $120,000 – 5.3%
- 2013 – $72,000 – 5.0%
- 2014 - $64,000 – 6.0%
- 2015 - $120,000 – 3.8%

- Trial Judge:
  - Given his age (51), length of employment (11 years), and character of employment (President and GM), the motion judge awarded him 17 months salary in lieu of notice
  - The bonus for 2016 was integral and not - discretionary
  - The trial judge awarded Singer his bonus for 2016 (the year he had worked) equal to 4.6% of profits
    - Employer had argued that it discovered in 2015 that the employee was not a good manager and that they hoped he improved (but he did not)
      - rejected this argument because the termination letter made no reference to any performance concerns
    - Argued that the bonus was discretionary and that Mr. Singer's division was not profitable enough, it was underperforming, he had not created expected efficiency gains and the company had denied other division heads a performance bonus in the past for poor performance
      - rejected this argument – the bonus documents were clear that if there were profits created, Singer was entitled to a share. Even though the historical amounts paid were variable, they were not discretionary. Also, again the termination letter made no reference to eligibility for the bonus.

Singer v Nordstrong Equipment Limited, 2018 ONCA 364 (cont'd)

- but the Court denied Singer's bonuses for 2017 and 2018

- did so on the basis that notice is provided to locate other employment and he did not work to earn the bonuses. Further, it was not within Singer's reasonable expectation that he would earn the bonus

Singer v Nordstrong Equipment Limited, 2018 ONCA 364 (cont'd)

Singer appealed and Nordstrong cross- appealed:

- The Court of Appeal upheld the 17 months and the 2016 bonus payment.
- It reversed the lower court decision on the 2017 and 2018 bonus issue and awarded Singer's lost bonuses based on the average amounts previously given to him in the two years prior
  - (The Court of Appeal also awarded the pecuniary value of the lost benefits despite him not using or replacing his benefits)
- The Court of Appeal reiterated the two-part test from *Paquette* for determining whether an employee is entitled to be compensated for the loss of his or her bonus as part of his or her damages for wrongful dismissal:
  - 1) Was the bonus an integral part of the employee's compensation package, triggering a common law entitlement to damages in lieu of bonus?; and
  - 2) If so, is there any language in the bonus plan that would restrict the employee's common law entitlement to damages in lieu of a bonus over the notice period?

Singer v Nordstrong Equipment Limited, 2018 ONCA 364 (cont'd)

- The lower court erred in not applying the *Paquette* test and had it done so, he would have found the bonuses to be an integral part of the compensation.
- Although the company's *de facto* use of bonuses was to incentivize employees to perform, this was not written into the bonus payment scheme

Employees Must be Aware of Any Limitations to their Bonus Entitlements Should the Employer Seek to Rely on Them

- Any bonus agreement or policy must be made known to the employee, otherwise the limitation to the bonus is invalid
  - *Poole v Whirlpool Corporation*, 2011 ONCA 808, affirming 2011 ONSC 4100; *Grace v Reader's Digest Assn (Canada) Ltd*, 1995 CanLII 7287 at para 64

TAKE AWAYS

- Bonus provisions that require an employee to be "actively employed" are not sufficient to displace an employee's entitlements
- Where an employer elects not to give working notice (and pay a lump sum instead) all benefits that the employee would have received had they worked the notice period must be continued, including bonus payments
- Where bonuses are an integral part of the compensation and where they are not limited by the terms of the bonus plans, they will be payable to employees during a notice period.

Thank you.

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Amendments to the *Employment Standards Act*, 2000 – From Bill 148 to Bill 47

By: Nicholas Reinkeluers

Bill 148

- The *Fair Workplaces and Better Jobs Act* ("Bill 148") was enacted by the previous Liberal government on November 22, 2017, shortly before the election
- Bill 148 introduced several new provisions including:
  - Equal pay for equal work provisions on the basis of employment status and assignment employment status;
  - One week's pay in lieu of notice for employees of temporary help agencies if longer-term assignments ended early;
  - Scheduling rules;
  - A minimum of three weeks vacation after five years with the same employer;
  - Domestic violence and sexual violence leave;
  - Expanded personal emergency leave including two (2) paid days off; and
  - Unpaid leave to take care of a critically ill family member
- Minimum wage was also increased to $14 per hour on January 1, 2018 and set to increase to $15 per hour on January 1, 2019

Doug Ford's Conservative Government

- On June 8, 2018, Doug Ford was elected Ontario's new Premier, running partially on a platform that he would scale back the minimum wage and other labour standards changed by the previous government

Bill 47

- The *Making Ontario Open for Business Act* ("Bill 47") received Royal Assent on November 21, 2018
- Bill 47's amendments to the *Employment Standards Act, 2000* ("ESA") came into force on January 1, 2019
- Bill 47 scales back some, but not all, of the new provisions introduced by Bill 148

No Change

- The following provisions, introduced by Bill 148, are **not** changing:
  - **Related employer provisions:** separate legal entities are treated as one employer if "associated or related activities or businesses" are carried on through multiple entities (ESA, s. 4(1))
  - **Vacation pay:** after five years of employment, an employee is entitled to three weeks of paid vacation (ESA, s. 35.2(b))
  - **The "three hour rule" for shortened shifts:** i.e. if an employee regularly works more than three hours and is required to present themselves to work but worked less than three hours, they are entitled to three (3) hours pay at their regular wage (ESA, s. 21.2(1))
  - **Domestic or sexual violence leave:** up to ten (10) days and up to fifteen (15) weeks of leave in a calendar year for domestic or sexual violence leave, with the first five (5) days remaining paid and the remaining days unpaid (ESA, s. 49.7)

Repealed

- The following provisions, introduced by Bill 148, are repealed with no replacement:
  - **Equal pay for equal work based on "differences in employment status":** e.g. part time versus full time; temporary workers versus employees on indefinite term contracts
  - **Equal pay for equal work based on temporary help agency status:** e.g. paying temporary help agency workers less (or more)
  - The corresponding ability to request the employer review the rate and either adjust the pay or provide a written response
  - **The "three hour rule" for cancelled shifts:** i.e. if an employer canceled an entire scheduled day of work or scheduled on-call period within 48 hours before the work or on-call period was to begin, the employer was required to pay three (3) hours at the employee's regular wage
  - **The Right to Refuse Work:** employees had a right to refuse a request or demand to work or be on call on a day that they were not scheduled if the request was made less than 96 hours before the start of work

Minimum Wage

Bill 148
Currently $14 per hour; was scheduled to increase to $15 per hour on January 1, 2019

Bill 47
The scheduled increase was repealed; minimum wage remains at $14 per hour; as of October 1, 2020, minimum wage is scheduled to increase annually at the rate of inflation

Misclassification

Bill 148

Misclassifying an employee as a dependent or independent contractor was specifically prohibited and the employer had the onus to establish that the complainant was **not** an employee

Bill 47

Misclassifying an employee as a dependent or independent contractor still remains prohibited (ESA, s. 5.1(1)) but the reverse onus requiring the employer to establish that the complainant was not an employee has been removed

Public Holiday Pay

Bill 148

As of January 1, 2018: public holiday pay = total amount of regular wages earned in a pay period immediately preceding the public holiday divided by the number of days that the employee worked in that period

Bill 47

Prorating formula: public holiday pay = total amount of regular wages earned and vacation pay payable in the four weeks before the work week in which the public holiday occurred, divided by 20 (i.e. the "old" formula) (ESA, s. 24)

Personal Emergency Leave

Bill 148

Employees were provided with ten (10) days of "personal emergency leave" with the first two (2) days of the leave paid

Bill 47

Paid leave has been repealed; unpaid leave entitlements have been split into the following categories: sick leave (three (3) days), family responsibility leave (three (3) days), and bereavement leave (two (2) days) (ESA, s. 50, 50.0.1 and 50.0.2)

Personal Emergency Leave: Doctor's Notes

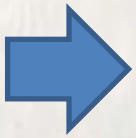
Bill 148
Prohibited an employer from requiring a certificate of a doctor or qualified health practitioner to justify the leave

Bill 47
The prohibition on requesting a doctor's note has been removed

Fines for Contraventions of the *ESA* |

Bill 148

Previous fines for contravening the ESA were in the amounts of $350 (first contravention), $700 (second contravention) and $1,500 (third contravention)



Bill 47

Fines for contravening the ESA have been reduced to their pre-Bill 148 amounts (i.e. $250 (first contravention), $500 (second contravention), and $1,000 (third contravention) (ESA, s. 113 and O. Reg 289/01, s. 1)

*Note: the fines for contraventions are multiplied by the number of employees affected

Summary of Changes

- Separate legal entities carrying on associated or related activities or businesses are treated as one employer
- Employees entitled to three weeks of paid vacation after five years of employment
- Employees must be paid for three hours if they attends at work, but not if they are on-call or shift is cancelled on short notice
- Right to equal pay for equal work based on differences in employment status has been repealed
- Right to refuse work on short notice has been repealed
- Minimum wage remains at $14 / hour, scheduled to increase annually at the rate of inflation
- Change to public holiday pay calculation, reverting to pre-Bill 148 formula
- Employees now entitled to domestic or sexual violence leave
- Paid personal emergency leave repealed and replaced with unpaid sick leave, family responsibility leave, and bereavement leave
- The prohibition on requesting a doctor's note has been removed
- Reverse onus placed on employers re: misclassifying an employee as a contractor has been repealed
- Fines for contravening the ESA have been reduced to their pre-Bill 148 amounts

Thank you.

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The Latest on Termination Clauses – *Amberber v. IBM Canada*

By: Sara Mosadeq

WHAT IS A TERMINATION CLAUSE?

- In the context of an employment agreement, a termination clause sets out the employee's entitlements upon termination without cause with respect to notice, pay in lieu of notice, severance pay, and benefit continuation
- Termination clauses are typically drafted in favour of the employer and have become increasingly popular and common in employment agreements.

Why are Termination Clauses Important?

- The common law provides rights to employees in respect of the notice period, which are very lucrative to the employee, but at the expense of the employer

- A termination clause is drafted in order to limit what the employer must pay to the employee upon termination and sets a formula for calculating notice or actually stipulates the notice period which is usually less than what the common law would provide

- Ex. A senior employee without a termination clause in his employment contract could be entitled to 18-24 months of notice according to the common law, whereas if there is a termination clause in his employment contract, he may only be entitled to 3 months of notice

HOWEVER:

- Whatever notice period is agreed upon by the employee and employer, the termination clause must still comply with the minimum standards set out in the *Employment Standards Act*, otherwise the termination clause is considered void and unenforceable.

Sample Termination Clause

We may terminate your employment in our sole discretion without cause, at any time during the term of your employment by providing you *with all payments and entitlements (including benefits, if any)* in accordance with the standards set out in *Employment Standards Act*, 2000, as may be amended from time to time.

You understand and agree that *the provision of notice, or pay in lieu of notice, benefit continuance and/or severance pay and any other payments required* under the Employment Standards Act, 2000 shall constitute full and final satisfaction of any claim, right, and or demand that you might have arising from or related to the termination of your employment under statute or common law.

Typical Pitfalls in drafting Termination Clauses

(a) The termination clause attempts to limit payments upon termination and fails to specifically mention entitlement to severance pay or benefit continuation

(b) Contains ambiguous language which fails to explicitly exclude entitlement to reasonable notice. Where the language is ambiguous, the court will interpret it in favour of the employee

(c) Termination clause provides formula which may result in less entitlements than the ESA minimums

Wood v. Fred Deeley Imports Ltd. 2017 ONCA 158

Facts:

- Employer, Fred Deeley Imports was the exclusive Canadian distributor of Harley-Davidson motorcycles and parts.
- Hired the employee, Wood in April 2007 as a Sales and Event Planner
- In April 2015, Deeley entered into an agreement with Harley-Davidson Canada to buy all of its assets. The buy out included that Deeley would terminate all of its employees, including Wood.
- Wood was notified that her employment would terminate on August 4, 2015.
- Wood had worked for Deeley for eight years and 4 months, her annual compensation including benefits was approx. $100,000.00. She was 48 years old when her employment ended.
- **Wood signed an employment contract with Deeley which contained a termination clause**

Wood v. Fred Deeley Imports Ltd. 2017 ONCA 158

"The Company is entitled to terminate your employment at any time without cause by providing you with 2 weeks' notice of termination or pay in lieu thereof for each completed or partial year of employment with the Company. *If the Company terminates your employment without cause, the Company shall not be obliged to make any payments to you other than those provided for in this paragraph*…The payments and notice provided for in this paragraph are inclusive of *your entitlements to notice, pay in lieu of notice and severance pay* pursuant to the Employment Standards Act".

Wood v. Fred Deeley Imports Ltd. 2017 ONCA 158

- Deeley paid Wood her salary and benefits for her 13 weeks of working notice (May 1 to August 4, 2015), plus additional compensation including a lump sum equivalent to eight week's pay.

- Wood still brought an action and contended that the termination clause was unenforceable. She asked for damages equivalent to 12 months notice of termination in accordance with the common law.

Wood v. Fred Deeley Imports Ltd. 2017 ONCA 158

Summary Judgment Decision: The Judge found that the termination clause was enforceable. Despite not expressly mentioning that the employer would continue contributing to the employee's benefit plans, the Judge found that that it was enforceable as it provided more than the minimum payment under the ESA. Judge also noted that the employer actually continued its benefit contributions throughout the notice period.

Ontario Court of Appeal Decision: The CA found that the termination clause was unenforceable because it did not provide for benefit plan continuation. In fact the following language excluded benefit contributions "…the payments and notice provided for in this paragraph are inclusive…". The employer argued that although the benefit continuation was not stated in the termination clause, the word "payment" included both salary and benefits. CA disagreed and found the word "payment" to be ambiguous.

North v. Metaswitch Networks Corporation 2017 ONCA 790

- The employee, North was employed pursuant to a written employment agreement. Employee received a base salary plus commissions.
- His employment was terminated without cause. A dispute arose as to whether his severance entitlement was limited by the employment contract or whether he was entitled to receive the common law reasonable notice.

North v. Metaswitch Networks Corporation 2017 ONCA 790

The employment agreement included a termination clause:

"Without Cause: The Company may terminate your employment at any time in its sole discretion for any reason, without cause, upon by providing you with notice and severance, if applicable, in accordance with the provisions of the Ontario Employment Standards Act. In addition, the Company will continue to pay its share of your employee benefits, if any, and only for that period required by the Act.

In the event of the termination of your employment, any payments owing to you shall be based on your Base Salary, as defined in this Agreement.

North v. Metaswitch Networks Corporation 2017 ONCA 790

Application Decision: North argued that the termination provision reduced his wages because it did not include his commissions and as such the clause was unenforceable. The employer argued that if the termination clause was invalid for excluding commissions, a severability provision in the contract, kept the other parts of the termination clause in force. The Application Judge agreed with the Employer and used the severability clause to remove the unenforceable part of the termination provision.

Court of Appeal Decision: The CA overturned the Application decision. The Court found that employment contracts are not ordinary contracts and as such require special interpretive considerations. The Court held: "…where a termination clause contracts out of one employment standard, the court is to find the entire termination clause to be void. It is an error in law to merely void the offending portion and leave the rest of the termination clause to be enforced.

The Shining Light for Employers: *Amberber v. IBM Canada* 2018 ONCA 571

- In April 2016, IBM advised Amberber that his employment was being terminated without cause.
- Amberber had been an employee for 15 years and 6 months.
- IBM provided Amberber with 11 weeks of working notice and a termination payment that was equivalent to 19.4 weeks of salary.
- The working notice and the pay in lieu notice when added together satisfied the entitlement under the termination clause in the parties' employment agreement.

Amberber v. IBM Canada 2018 ONCA 571

Termination Clause:

If you are terminated by IBM other than for cause, IBM will provide you with notice or a separation payment in lieu of notice of termination equal to the greater of (a) one (1) month of your current annual base salary or (b) one week of your current annual base salary, for each completed six months worked from your IBM service reference date to a maximum of twelve (12) months of your annual base salary. This payment includes any and all termination notice pay, and severance payments you may be entitled to under provincial employment standards legislation and Common Law. Any separation payment will be subject to applicable statutory deductions. In addition, you will be entitled to benefit continuation for the minimum notice period under applicable provincial employment standard legislation. In the event that the applicable provincial employment standard legislation provides you with superior entitlements upon termination of employment ("statutory entitlements") than provided for in this offer of employment, IBM shall provide you with your statutory entitlements in substitution for your rights under this offer of employment.

Amberber v. IBM Canada 2018 ONCA 571

Summary Judgment Decision:

The Judge found that the termination clause consisted of three parts, the "options provision", the "inclusive payment provision" and the "failsafe provision".

The Judge found that it was clear that the inclusive payment provision applied to the options provision but it was not clear that the inclusive payment provision was meant to apply to the fail safe provision, because the inclusive payment provision was not again repeated after the failsafe provision.

The fail safe provision, when read on its own, did not rebut the common law presumption of reasonable notice, as such this ambiguity was to be construed against the employer.

Amberber v. IBM Canada 2018 ONCA 571
Court of Appeal Decision:

The CA overturned the summary judgment decision. The CA found that the motion judge made a fundamental error by subdividing the termination clause into what she regarded as its constituent parts and interpreted them individually.

The CA found that the individual sentences in the termination clause cannot be interpreted on their own, rather the clause must be interpreted as a whole.

When read as a whole, there can be no doubt as the clause's meaning:

First, the parties set forth a formula for calculating the amounts owing to Amberber, second the amounts owning include any entitlement under the ESA and the common law, and third where the ESA provides for something superior, the employee will receive that statutory entitlement.

Amberber v. IBM Canada 2018 ONCA 571
Key Takeaways

1. Good news for employers!
2. Decision makers to consider the entire termination clause and avoid reaching decisions based on parts of the clause.
3. Decision makers not to strain to create ambiguity where there is none.
4. But there is still a significant amount of uncertainty that exists, so although Amberber is a positive step forward, most employers should still seek the assistance of a lawyer when drafting employment agreements and specifically termination provisions.

Thank you.

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Networking

&

Coffee Break

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Update on Termination for Cause Provisions

By: Michelle Cook, Student-at-law

Employment Standards Act: WITHOUT CAUSE

- The *Employment Standards Act* ("*ESA*") sets out an employee's statutory minimum entitlements
- If an employee is terminated without cause the employee is entitled to termination pay and may be entitled to severance pay
  - Termination Pay, s.57: between 0 to 8 weeks
  - Severance Pay, s. 65: the number of years the employee has worked, divided by 12

Employment Standards Act: CAUSE

- As the *ESA* sets out the floor of an employee's entitlements in Ontario, the standard for "cause" under the *ESA* is extremely high and requires "wilful misconduct, disobedience or wilful neglect of duty"

O. Reg. 288/01: TERMINATION AND SEVERANCE OF EMPLOYMENT

TERMINATION OF EMPLOYMENT

Employees not entitled to notice of termination or termination pay

2. (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are not entitled to notice of termination or termination pay under Part XV of the Act:

(…)

3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

SEVERANCE OF EMPLOYMENT

Employees not entitled to severance pay

9. (1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

6. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

Employment Standards Act: WILFUL MISCONDUCT OR NEGLECT OF DUTY

- In order to prove wilful neglect of duty disentitling an employee to notice of termination or pay in lieu, the employer must establish that the employee "**consciously** did something or omitted to do something that can be described as serious and wilful neglect of duty" (*Exeter Machine Products (1995) Ltd*, 2004 CanLII 17789 at para 15 (ON LRB))

Employment Standards Act: WILFUL MISCONDUCT OR NEGLECT OF DUTY

- 'The "misconduct" or "neglect of duty" referred to in the Act is preceded by the term "wilful". Therefore, it is not sufficient to merely show that an employee was indifferent, casual, thoughtless or neglectful in the performance of, or in the omission to perform, his or her duties or responsibilities. These acts or omissions must be the product of some deliberate or intentional act. The employee must consciously and deliberately engage in some positive act of misconduct or deliberately refrain from performing duties or responsibilities that he or she was required to perform.' (*Rea International Inc o/a Altas Fluid Systems*, 2010 CanLII 67923 at para 38 (ON LRB))

Employment Standards Act: WILFUL MISCONDUCT OR NEGLECT OF DUTY

"There are two general categories of **serious misconduct**. There will be single acts: insubordination, theft and dishonesty, and physical violence against other employees, for instance, which may, standing on their own, meet that standard of seriousness. As well, there will be less serious repetitive forms of misconduct, which if handled properly by the employer, will also meet this standard of seriousness. The employer, in this scenario, must have explained to the employee after each occurrence that the conduct in question was not acceptable and that if continued would result in termination and there must be, subsequent to these warnings, a culminating incident.

Employment Standards Act: WILFUL MISCONDUCT OR NEGLECT OF DUTY

In addition to proving that the misconduct is serious, the employer must demonstrate, and this is the aspect of the standard which distinguishes it from 'just cause', that the conduct complained of is **'wilful'**. Careless, thoughtless, heedless or inadvertent conduct, no matter how serious, does not meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose."

– *VME Equipment of Canada Ltd*, [1992] OESAD No 230

Common Law: JUST CAUSE

- Where an employment contract does not limit an employee's entitlements upon termination (or if there is no employment contract), an employee is entitled to a longer period of notice based on the common law, i.e. decisions reached by the courts in similar cases in the past
  - This amount is **usually equivalent to one month for every year worked** but varies based on the factors as set out in *Bardal v Globe & Mail Ltd* (1960), 24 DLR (2d) 140 (Ont HC), at p. 145:
    - Age
    - Length of service
    - Character of employment
    - Availability of similar employment
- Where an employee has been terminated for "just cause" under the common law, the employee is **not** entitled to common law reasonable notice (or payment in lieu of notice) but **may** still be entitled to *ESA* statutory minimums

Common Law: JUST CAUSE (cont'd)

- The common law standard for "just cause" is lower than the *ESA* standard for "willful misconduct, disobedience or wilful neglect of duty"
- Employees can be terminated for just cause for:
  - Criminal activities in the course of employment (see *Meszaros v Simpsons-Sears Ltd* (1979), 19 AR 239 (Alta QB));
  - Dishonesty (see *McKinley v BC Tel*, [2001] 2 SCR 161 at paras 48-49);
  - Misconduct (see *Fernandes v Peel Educational & Tutorial Services Ltd.*, 2016 ONCA 468 at paras 103-05);
  - Gross insolence or rudeness to the employer (however, if the insolence is merely a personality clash, the court will go to the root of the behavior) (see *Clare v Moore Corp* (1989), 29 CCEL 41 (Ont Dist Ct));
  - Chronic lateness or persistent or prolonged absence from work (provided it is not justified time off for a medical issue) (see *Cardenas v Canada Dry Ltd* (1985), 10 CCEL 1 (Ont Dist Ct));
  - Serious or wilful disobedience (see *Byer v Himark Enterprises Inc* (1998), 39 CCEL (2d) 203 (Ont Gen Div); affirmed (1999), 128 OAC 247 (Ont CA)); and
  - Sexual harassment (see *Simpson v Consumers' Assn of Canada* (2001), 13 CCEL (3d) 234 (Ont CA); leave to appeal refused (2002), 2002 CarswellOnt 2653 (SCC))

Khashaba v Procom Consultants Group Ltd, 2018 ONSC 7617

FACTS:

- The employee, Mr. Khashaba, received an email from a recruiter with Procom asking him if he was interested in applying for a position with another company, Alectra
  - Mr. Khashaba was currently employed but had posted his resume to the job finding site Monster.com
- Mr. Khashaba indicated that he was interested in the position, asked for more information and eventually attended an interview
- Over the phone and in congratulatory emails, Procom indicated that Alectra was offering him the position
  - At that time, they sent him onboarding emails including an employment contract that he signed and returned back

Khashaba v Procom Consultants Group Ltd

FACTS (cont'd):

- Procom sent an email indicating that once the criminal background check was done, Mr. Khashaba could give his current employer notice of resignation
- Procom later sent an email indicating that the background check was completed and came back clear
- One minute later, the supervisor of the Procom employee wrote an email to Mr. Khashaba instructing him to hold off on giving notice as there was "always an outside chance it doesn't get approved."
  - Mr. Khashaba only saw the first, not the second, email and resigned
- Despite sending congratulatory and onboarding emails, they knew at the time they instructed him that his background check was clear that another candidate had been selected for the position

Khashaba v Procom Consultants Group Ltd

FACTS (cont'd):

- The employment contract that Mr. Khashaba was sent, which he signed and returned, included the following provisions as part of a larger "Early Termination" clause:

> **5. Early Termination**
>
> (…)
>
> **(b) Termination for Cause** Procom may, at its option, terminate your employment immediately for cause, without prior written notice or compensation of any nature. For these purposes, "cause" means any grounds at common law for which an employer is entitled to dismiss an employee summarily without notice or compensation in lieu of notice.

(c) Termination without Cause Notwithstanding the fixed Term of this Agreement, Procom may terminate your employment without cause at any time by providing you with only the minimum amount of notice of termination or pay in lieu thereof (at the Company's sole discretion, in any combination), minimum benefits continuation (if applicable), and minimum severance pay (if applicable), as required by the *Employment Standards Act, 2000*, as well as accrued wages and vacation pay up to an including the date of termination. In no event will you receive less than your minimum entitlements under the *Employment Standards Act, 2000*. If a greater entitlement is required under the *Employment Standards Act*, 2000 than this provision grants you, your entitlements shall automatically be increased to satisfy only the minimum entitlements required by the *Employment Standards Act, 2000* on the termination of your employment. You understand and agree that the entitlements set out in this paragraph will constitute your full, exclusive and final entitlements to notice or pay in lieu of notice, severance pay (if applicable), and benefits continuation (if applicable), including in the event of a constructive dismissal and including any entitlements to common law notice and by your acceptance of this Agreement waive any further other claim at common law relating to such termination.

Khashaba v Procom Consultants Group Ltd

Position of the Parties:

- Mr. Khashaba argued that the termination for cause provision was contrary to the *Employment Standards Act* and therefore the entire agreement (or at least the entire "Early Termination" clause) was invalid as it contained an illegal provision. Therefore, he requested common law damages for the duration of the contract (April 30, 2018 to October 31, 2018)
  - Note: if a fixed term contract does not contain an early termination clause, upon termination an employee is entitled to the amount of wages they would have received until the end of the term (para 60) (see also *Howard v Benson Group Inc*, 2016 ONCA 256)
  - i.e. the real purpose of targeting the "Termination for Cause" provision was not because it applied to his situation – he wanted to invalidate the entire contract
- Procom argued that Mr. Khashaba had been dismissed without cause → as per provision 5(c) he was only entitled to *Employment Standards* entitlements (i.e. nothing); if the "Termination for Cause" provision was illegal (which they denied), it had no impact on the other parts of the clause as there was a severability clause

Khashaba v Procom Consultants Group Ltd

DECISION:

- The employer was successful: while the "Termination for Cause" provision was contrary to the *Employment Standards Act*, only the provision and not the entire clause was voided; as such, the "Termination without Cause" provision was still valid and enforceable → no entitlement under the common law or *Employment Standards Act*
  - The judge noted that the employment contract contained a severability clause (although the judge did not rely on it)
  - The judge also noted that the wrong done was "more sensibly understood as a negligent misrepresentation" (but this was not plead so no damages were awarded)

Khashaba v Procom Consultants Group Ltd

Analysis (Was there a contract?):

- Intent to contract: the judge found a "clear and unambiguous intention to make a binding contract"
- The requirement that the employee undergo a credit and criminal record check was not a condition that would have prevented the formation of a contract

Khashaba v Procom Consultants Group Ltd

Analysis (*ESA* "Cause" versus Just Cause):

- The "Termination for Cause" provision of the Employment Agreement did **not** comply with the *ESA* as it allowed for termination without notice for conduct meeting the just cause standard under the common law, while precluding *ESA* entitlements required the higher standard of "wilful misconduct"
- Wilful misconduct under the *ESA* involves an assessment of subjective intent, whereas common law just cause is a more objective standard (para 53)
- Carelessness, thoughtless, heedless or inadvertent conduct, no matter how serious, does not meet the *ESA* standard for wilful misconduct (para 53)
- In contrast, prolonged incompetence, without any intentional misconduct can give rise to a finding of just cause under the common law (para 53)

Khashaba v Procom Consultants Group Ltd

Analysis (Language in Employment Contracts):

- While the "Termination without Cause" provision included language that made it clear that an employee would not get less than their minimum *ESA* entitlements, this was a separate provision and therefore could not "save" the "Termination for Cause" provision (para 54)
- Where the language of a termination clause is unclear or can be interpreted more than one way, the court should adopt the interpretation most favourable to the employee (para 55)
  - See also: *Wood v Fred Deeley Imports Ltd*, 2017 ONCA 158; *Ceccol v Ontario Gymnastics Federation* (2001), 149 OAC 315
- It does not matter if the employer actually complied with the *ESA* or whether the illegal provision actually applied to the employee- the legality of the provision depends on the wording of the provision (para 59)

Khashaba v Procom Consultants Group Ltd

DECISION:

- The "Termination for Cause" provision was void as it was contrary to the *ESA*; however the remaining provisions within the clause were valid and enforceable
  - i.e. if a provision is invalidated, only the illegal provision is void and the rest of the contract remains in force
- The determination of validity is assessed on a clause by clause basis (instead of for the contract as a whole) (para 63)
- While termination clauses should be interpreted in a way that incentivizes employers to draft *ESA*-compliant clauses at the outset, the "Termination without Cause" provision was still valid because:
  - The provision evinced a clear intention to comply with the *ESA*;
  - The violation of the *ESA* was in a separate provision; and
  - The contract contained a severability clause

TAKEAWAYS

- Common law just cause ≠ *ESA* wilful misconduct, disobediance or neglect of duty
  - *Cummings v Quantum Automotive Group Inc*, 2017 ONSC 1785 at para 74; *Khashaba v Procom Consultants Group Ltd*, 2018 ONSC 7617
- Make sure that termination for cause provisions are drafted to include the distinction between *ESA* "cause" and "just cause" under the common law (such that *ESA* minimum entitlements may still be required even if the just cause standard is met)
- Break employment provisions into separate paragraphs to avoid the invalidation of the entire clause (and avoid grouping multiple clauses together)
  - Be especially careful with grouping termination for cause provisions with other termination provisions
- Ensure that employment contracts have enforceable severability clauses

Thank you.

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Frustration of Contract due to Disability – *Roskaft v. RONA Inc. (2018)*

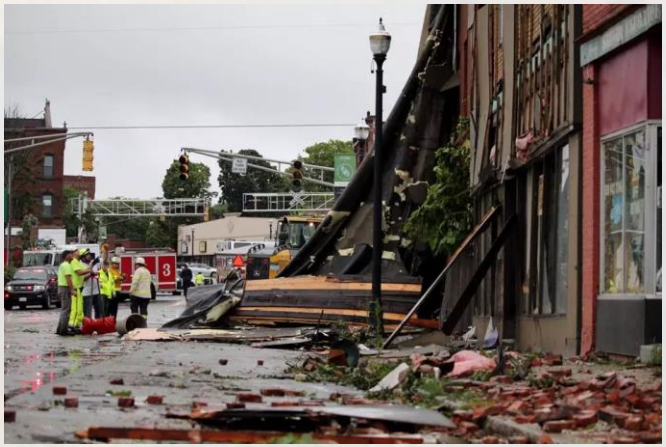
By: Marty Rabinovitch

WHAT IS FRUSTRATION?

- "frustration" = subsequent to the formation of the contract, **an unforeseen event or circumstance** results in the obligations under the contract being radically different from those contemplated at the time of the formation of the contract
  - Change in circumstances **was unforeseeable** and **occurred through no fault of either party**
  - Typically frustration is associated with an inability to perform the original contract
  - ex. *Taylor v. Caldwell* (1863) - contract to rent music hall for a concert – hall burns down prior to performance date = frustration

COMMON FORMS OF FRUSTRATION IN EMPLOYMENT RELATIONSHIPS

- Frustration is a fact-specific determination made on a case-by-case basis
- Examples of frustration:
  - An employee is unable to work due to injury or illness
  - A catastrophic event (i.e. tornado, flood, power outage, etc.)
  - A change in the law which bans the sale of a product that was contracted for



FRUSTRATION DUE TO DISABILITY

"Frustration is established if, at the time of termination, there is no reasonable likelihood of the employee being able to return to work within a reasonable time"

- *Fraser v UBS*, 2011 ONSC 5448 at para 32

FRUSTRATION DUE TO DISABILITY: TEMPORARY ILLNESS OR DISABILITY

- Where an illness or disability is of a **temporary** nature, the contract is not frustrated
  - Where the disability prevents an employee from performing their regular duties but does not render them altogether unable to work, human rights legislation may give rise to a duty to accommodate the employee
  - However, "the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or **if an employee with such an illness remains unable to work for the reasonably foreseeable future** even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In these circumstances, the impact of the standard will be legitimate and the **dismissal will be deemed to be non-discriminatory**. (…) the employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future" (*Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000*, 2008 SCC 43 at paras 18-19)

FRUSTRATION DUE TO DISABILITY: TEMPORARY ILLNESS OR DISABILITY

- Frustration due to disability = **Permanent** disability renders the performance of an employment contract impossible
- Whether the illness or disability is "permanent" is based on a case-by-case basis typically with reference to the following factors:
  - Nature and expected length of the illness
  - Prospect of recovery
  - Length of service

BURDEN OF ESTABLISHING FRUSTRATION

- The burden of proving frustration rests on the party seeking to rely on it
  - i.e. it is the employer's burden to prove that the contract had become frustrated rather than the employee's onus to provide medical evidence of their prognosis (*Naccarato v Costco* at para 13)
  - but employee can also allege frustration (see *Estate of Cristian Drimba*, 2015)
- Given the harsh consequences on an employee, courts will closely scrutinize facts before determining that an employment contract has been frustrated

WHAT HAPPENS IF THE CONTRACT IS FRUSTRATED DUE TO DISABILITY?

- If frustration→ contract is terminated without liability to either party
- The employer is NOT required to pay **common law** notice or payment in lieu of notice

BUT…

- If the employment contract was frustrated due to the employee's disability, the employer must pay the employee his or her **statutory minimums** under the *Employment Standards Act, 2000* and the relevant regulation

EMPLOYMENT STANDARDS ACT

- *O. Reg. 288/01: TERMINATION AND SEVERANCE OF EMPLOYMENT*

TERMINATION OF EMPLOYMENT

Employees not entitled to notice of termination or termination pay

- **2.** (1) The following employees are prescribed for the purposes of section 55 of the Act as employees who are **not entitled to notice of termination or termination pay** under Part XV of the Act:

  (…)

  4. An employee whose contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance.

- (3) Paragraph 4 of subsection (1) **does not apply if the impossibility or frustration is the result of an illness or injury suffered by the employee.** O. Reg. 549/05, s. 1 (2).

EMPLOYMENT STANDARDS ACT

- *O. Reg. 288/01: TERMINATION AND SEVERANCE OF EMPLOYMENT*

SEVERANCE OF EMPLOYMENT

Employees not entitled to severance pay

- **9.** (1) The following employees are prescribed for the purposes of subsection 64 (3) of the Act as employees who are not entitled to severance pay under section 64 of the Act:

  (…)

  2. Subject to subsection (2), an employee whose contract of employment has become impossible to perform or has been frustrated.

- (2) Paragraph 2 of subsection (1) does not apply if,

  (…)

  (b) the **impossibility or frustration is the result of an illness or injury suffered by the employee.** O. Reg. 288/01, s. 9 (2); O. Reg. 549/05, s. 2.

Naccarato v Costco, 2010 ONSC 2651

FACTS:

- An employee worked for Costco for 12 years as a "return-to-vendor clerk" (i.e. a general customer service employee) before going on a work absence for illness/injury
- He initially received short-term disability benefits and then long-term disability benefits for depression
  - He was terminated by Costco in 2006 after his continued absence for approximately five years and his inability to return to work within that time
  - In 2007, the employee's psychiatrist wrote: "[at] his present condition, I can't predict when Mr. Naccarato will be able to return to his job."
    - When they received this note, it was after his termination and the employer did not follow up whether the employee's return to work was "reasonably foreseeable"

Naccarato v Costco, 2010 ONSC 2651 (cont'd)

ANALYSIS:

- Despite the long duration of the absence, the employer was deemed not to have submitted any evidence that there was no reasonable likelihood of return to work at the time of termination (as the doctor's note did not make any opinion on return to work)
  - Refused to infer that the long duration of absence was "evidence" to be considered
- Even though the doctor's note was after the termination, they could have followed up whether the return to work was "reasonably foreseeable" but did not do so → failed to prove frustration

Naccarato v Costco, 2010 ONSC 2651 (cont'd): Frustration based on character of employment?

- Relying on *Dragone v Rita Plumbing Limited*, 2007 CanLII 40543 (Ont. Sup. Ct.) and *Skopitz v Intercorp Excelle Foods Inc*, [1999] OJ No 1543 (Ont. Gen. Div.):
  - "Whether a contract of employment has been frustrated by an employee illness or incapacity depends on whether or not the illness or incapacity was of such a nature or likely to continue for such a period of time that either the employee would never be able to perform the duties contemplated by the original employment contract or that it would be unreasonable for the employer to wait any longer for the employee to recover. **To determine if a contract has been frustrated, regard must be had to the relationship of the term of the incapacity or absence from work to the duration of the contract, and to the nature of the services to be performed.**"

Naccarato v Costco, 2010 ONSC 2651 (cont'd)

- "For example, when the absent employee is a senior executive whose absence cannot be long tolerated if the business enterprise is to succeed, then a relative short period of incapacity may frustrate a contract. However, a longer period of time before frustration occurs may be the case for employees with lesser roles in the business."
- As the employee was a low level employee and the employer did not provide any evidence of any hardship or disruption to its business as a result of maintaining the employee's employment status = no frustration = termination without cause → awarded common law pay in lieu of notice

Fraser v UBS Global Asset Management, 2011 ONSC 5448

FACTS:

- Ms. Fraser was employed for more than 20 years with UBS
- She developed a disability and went on medical leave:
  - 6 months: short term disability ("STD");
  - 4 months: returned to work on a trial basis;
  - 6 months: went back on STD;
    - Part way through the second STD, she underwent an independent medical assessment at the request of her employer
    - The doctor's prognosis at that time was favourable for a gradual return to work
  - 1 year, 9 months: long term disability ("LTD") until the insurer terminated the LTD on the basis that the employee did not follow the medical treatment plan or did not provide proof of doing so as required under the policy
  - 4 months later: employer terminated employee

Fraser v UBS Global Asset Management, 2011 ONSC 5448 (cont'd)

ANALYSIS:

- While at the time of the employment the employer only had one (slightly optimistic) medical report, the employer could rely on:
  - The fact that the employee had not worked in 3.5 years;
  - That during that time, despite the intimal optimistic prognosis, the employee did not return to work and did not provide any updated medical prognoses indicating a reasonable prospect of returning to work;
  - The LTD insurer had alleged she had not participated in or at least not reported her ongoing medical treatment (and this decision was not immediately appealed)
- Medical evidence subsequently discovered can be relied on if it relates to the time of termination (para 30)

Fraser v UBS Global Asset Management, 2011 ONSC 5448 (cont'd)

DECISION

- The employee was absent for nearly two years and did not advise the employer of any change in her medical prognosis, advise of her return to work or indicate the cessation of her treatment → frustration of contract

Does the presence of STD or LTD Benefits Indicate that the Contract Cannot be Frustrated?

- While there was some suggestion in previous case law that the presence of disability benefits may indicate that the employee's disability may have been within the contemplation of the parties at the time of the formation of the contract, the mere fact of such coverage does not mean that the employer has agreed to indefinitely employ someone despite their inability to work (*Fraser v UBS*, 2011 ONSC 5448 at para 26)

Estate of Cristian Drimba v Dick Engineering Inc, 2015 ONSC 2843

FACTS:

- On May 22, 2013, Mr. Drimba advised his employer that he had shingles and would be away for six months
- In June of 2013, he was diagnosed with terminal cancer
- In August of 2013, the employer confirmed in writing that despite an upcoming asset sale, Mr. Drimba's employment would continue until such time as he was well enough to return to work (at which point the employer would arrange an interview with the asset purchaser)
- September 17, 2013, Mr. Drimba died

Estate of Cristian Drimba v Dick Engineering Inc, 2015 ONSC 2843

ANALYSIS:

- Given the seriousness and severity of his illness, it was highly unlikely that Mr. Drimba would ever be able to resume employment
- Notwithstanding the employer's generosity to keep his position open, this was a false hope
- As such, the contract was frustrated at the moment he was diagnosed with a terminal cancer → owed statutory minimum entitlements

Estate of Cristian Drimba v Dick Engineering Inc, 2015 ONSC 2843

Why does the frustration at diagnosis versus death matter?

- As the contract was frustrated prior to Mr. Drimba's death, he was entitled to receive his statutory minimum entitlements under the *Employment Standards Act, 2000*
- If Mr. Drimba had died suddenly without a terminal diagnosis, likely no entitlements – none pursuant to the *ESA* or the common law

Roskaft v RONA Inc, 2018 ONSC 2934

FACTS:

- The employee was employed for 10 years in a clerical position prior to going on a disability leave
- STD and LTD benefits were provided through an external insurer
- Approximately two years after going on disability leave, the employee completed a Return to Work form which indicated that he was unable to work and that his return to work date was "N/A"
- Soon after, the employer was advised by the external insurer that the employee was totally disabled in relation to his own occupation and any occupation
- Approximately nine months later, the employer, reviewing the letter from the insurer and without any other documentation indicating the contrary, deemed the employee "permanently" totally disabled from any occupation and terminated him as a result of frustration of the employment contract

Roskaft v RONA Inc, 2018 ONSC 2934 (cont'd)

Position:

- Employer's position: they reasonably relied on the insurer's determination and were not required to contact the employee for further information
- Employee's position: he worked in a non-essential clerical position and went on disability following a job related injury. He alleged it was not known at the time of his termination whether he would be returning to work within a reasonable time frame and he did not submit any updated medical documentation because he was not asked to do so

Roskaft v RONA Inc, 2018 ONSC 2934 (cont'd)

ANALYSIS:

- Post termination evidence:
  - In his later submissions to the insurer for LTD benefits up to one year and five months post-termination, the employee indicated that his current medical condition had not improved
- While frustration of contract is always established with reference to the time of the dismissal, the employer is allowed to rely on post-termination evidence not in its possession at the time of dismissal so long as it relates to the nature and extent of the employee's disability at the time of dismissal (para 22)
  - If that evidence is not relevant to the dismissal date, then the employer is not entitled to rely on that evidence
- The employer was allowed to rely on this subsequently disclosed evidence as it shed light on the nature and extent of the employee's disability at the time of his dismissal → the issue was whether at the time of termination there was a reasonable likelihood that he would be able to return to work within a reasonable period of time
  - This evidence contradicted the employee's assertion that had he been asked for medical evidence, he would have been able to provide evidence that he would have been able to return to work

Roskaft v RONA Inc, 2018 ONSC 2934 (cont'd)

DECISION

- The contract was frustrated:
  - While the insurer's letter made no explicit reference to a "permanent" disability, there was enough evidence at the time of termination that the employee was sufficiently disabled to qualify for LTD benefits
  - The employee continued to represent (post-termination) that his medical condition had not improved and he was totally disabled from performing the duties of any occupation
  - The employee continued to receive LTD benefits

Note: LTD Policies & Frustration

- Most LTD plans have a different qualification standard after 24 months of receiving LTD benefits:
  - Pre 24 months: unable to perform any of the material and substantial duties of regular employment
  - After 24 months: inability to perform the duties of any gainful occupation
- Caution: while the second standard is substantially higher to meet and may be indicative of a "permanent" disability, it does not actually amount to a determination of permanency

Recommendations

- An employment contract may be frustrated upon the diagnosis of a terminal illness
- A contract **may** be frustrated if an employee qualifies for LTD benefits after two years
- If there is uncertainty whether an employee is temporarily or permanently disabled, seek additional medical evidence
- Communicate with your external insurer to be advised if an employee's STD or LTD benefits are terminated
- **Always seek professional legal advice, especially before deciding to terminate an employee (in particular if the employee has a disability)**

Thank you.

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