

## To Pay Vacation Pay, Or Not Pay Vacation Pay: That Is The Question

We are often asked by employers to provide direction about payment of vacation pay to departing employees. What may seem like a simple question, however, can in fact be quite complex.

### Legal Framework

When an employee is dismissed – whether with or without just cause – the employer must pay the employee his or her accrued wages to the date of termination, along with his or her accrued but unpaid vacation pay, in accordance with applicable employment standards legislation.<sup>1</sup>

While the rules above seem relatively straightforward, the issue is complicated in the case of an employee who is dismissed without cause and given pay in lieu of notice. The question then becomes whether or not the employee continues to accrue vacation pay during the applicable period of notice (whether under statute, contract or common law). On this point, the law is somewhat divided.

### Case Law Principles

In *Cronk v Canadian General Insurance Co.*,<sup>2</sup> the Ontario Court of Appeal opined that vacation pay continues to accrue during the

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<sup>1</sup> For Ontario jurisdiction employees, see *Employment Standards Act, 2000*, SO 2000, c 41, ss. 11(5) and 38. Of course, an employee dismissed without cause must also receive notice of termination or pay in lieu thereof, severance pay and benefit continuation (where applicable).

<sup>2</sup> (1995), 25 OR (3d) 505 (ONCA).

statutory notice period only. Beyond that, the Court held that vacation pay does not accrue where the employee is "free from any obligations" to the employer. The Court directed as follows:

*Vacation pay arises as a result of the contract of employment providing for a period of time during the employment year when the employee is not required to "work" but yet is entitled to pay ... The [employee] was entitled to receive vacation pay upon the termination of her employment. The statutory benefit must obviously be calculated in accordance with the provisions of the statute and does not apply to the period of notice to which the [employee] is entitled at common law if that period exceeds to period to which the statutory benefit applies.*

The foregoing quote has been cited to support the proposition that employees are only entitled to vacation pay with respect to the statutory notice period. In one case, *Garvin v Rockwell International of Canada Ltd.*,<sup>3</sup> the Court went one step further and held that vacation pay should not accrue beyond the statutory notice period *absent an employment agreement or custom to the contrary*.

On the other hand, however, the Court in *Emery v Royal Oak Mines Inc.*<sup>4</sup> held that an employee is entitled to accrue vacation

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<sup>3</sup> 1993 CarswellOnt 966 (Ct J (GD)).

<sup>4</sup> 1995 CarswellOnt 456 (Ct J (GD)). The ONCA's decision in *Cronk* should prevail because it is a binding precedent which has not been overturned, particularly since it was decided after *Emery*. However, subsequent decisions have held that employees are entitled to accrue vacation pay during the common law period of notice pursuant to *Emery*. For example, see *Minns v. 943372 Ontario Inc.*, 1999 CarswellOnt 2997 (ONSC), where there was seemingly no employment agreement governing reasonable notice of termination and/or vacation pay. It is important to note, however, that *Cronk* does not appear to have been before the court in this decision. Thus the "confusion" in the law in this area may be a function of a failure to adhere to or bring the ONSC's attention to a point which was arguably settled in *Cronk*.

pay during the entire period of notice if the employee can show that he or she has suffered a loss or deprivation.

### Advice for Employers

In light of the decisions in *Garvin and Emery*, employers would be wise to carefully draft employment agreements and/or policies that either (a) limit an employee's entitlement to vacation pay to the applicable statutory minimum, or (b) expressly state that vacation pay entitlements which exceed applicable statutory minimums do not continue to accrue beyond the statutory notice period. Given that the law is arguably in a state of flux, however, employers should be aware that they may be ordered to open their wallets in the event that an employee brings a complaint or action for vacation pay "accrued" beyond the statutory notice period.

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#### a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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